(31,493)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 770

THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, O. P. B. JACOBSON ET AL., AND CITY OF DULUTH, APPELLANTS,

vs.

THE DULUTH STREET RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

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[fol. 6]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION

In Equity

THE DULUTH STREET RAILWAY COMPANY, Complainant,

vs.

THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE of Minnesota, O. P. B. Jacobson, Fred W. Putnam, Ivan Bowen, and Clifford L. Hilton, Defendants.

BILL OF COMPLAINT—Filed July 18, 1922

To the Honorable Judges of the District Court of the United States in and for the District of Minnesota:

The complainant, The Duluth Street Railway Company, for its complaint herein, alleges:

1. That during all the times hereinafter mentioned the defendant, The Railroad and Warehouse Commission of the State of Minnesota has been and now is a Commission created and existing pursuant to the laws of the State of Minnesota, and that the defendant, O. P. B. Jacobson is the Chairman thereof, and the defendants, Fred W. Putnam and Ivan Bowen are Commissioners thereof and with the Chairman of said Commission comprise said Commission, and that the defendant Clifford L. Hilton is the Attorney General of the State of Minnesota.

2. That the complainant is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota and is now and during all times herein mentioned to and including April 28, 1921, has been engaged in building, maintaining and operating a street railway as [fol. 7] a carrier of passengers for hire in the City of Duluth, under and pursuant to Chapter 200 of the Laws of Minnesota for the year 1881 (Extra Session); an ordinance duly passed by the Village Council of the Village of West

Duluth on July 13, 1891, approved July 14, 1891, and published July 17, 1891 being entitled—

"An Ordinance granting to The Duluth Street Railway Company the right to construct, maintain and operate street railways in the Village of West Duluth";

an ordinance duly passed July 11, 1891 and published July 20, 1891, by the City Council of the City of Lakeside, entitled—

"An Ordinance granting to Lakeside Railway Company the right to construct, maintain and operate an electric street railway in the City of Lakeside";

an ordinance passed by the Village Council of the Village of Park Point, as approved June 23, 1887, entitled—

"An ordinance granting right of way to Minnesota Point Street Railway Company,"

and also an ordinance passed by the City Council of the City of Duluth on December 6, 1892, approved December 10, 1892, entitled—

"An ordinance confirming and declaring that certain ordinance of the Village Council of the Village of Park Point, entitled 'An ordinance granting right of way to the Minnesota Point Street Railway Company,' Approved June 23rd, 1887, and further providing that the Minnesota Point Street Railway Company release and surrender to the City of Duluth, its rights and privileges in, upon and over certain streets, avenues and highways in said city,"

all of which are hereby referred to and made a part of this bill as fully and completely as though fully set forth herein; that the City of Duluth is the successor of the Village of West Duluth and the City of Lakeside, and complainant herein has succeeded to all of the rights, privileges and franchises granted to Lakeside Street Railway Company by said ordinance hereinabove referred to, passed by the City Council of the City of Lakeside, and complainant herein has succeeded to all the rights, privileges and tran-[fol. 8] chises granted to said Minnesota Point Street Railway Company by said ordinance hereinabove referred to, passed by the Village Council of the Village of Park Point

and the ordinance hereinabove referred to, passed by the City Council of the City of Duluth.

3. That on April 14, 1921, Chapter 278 of the General Laws of the State of Minnesota for the year 1921 entitled "An Act relating to street railways" became effective.

4. That on the 28th day of April, 1921, your complainant filed with the Clerk of the City of Duluth a declaration and consent pursuant to the provisions of Chapter 278, General Laws of Minnesota for the year 1921, and the City Clerk of the City of Duluth duly filed said declaration and consent and on said day issued to your complainant a certificate that such declaration and consent had been filed in his office, a true and correct copy of said certificate and said declaration and consent being hereto attached and made a part hereof as fully as though the same were herein incorporated in detail, marked Exhibit "A."

5. That on the 29th day of April, 1921, said certificate was duly filed with the Secretary of State of the State of Minnesota.

6. That your complainant owns, operates, maintains and controls a street railway system in the City of Duluth under and pursuant to an indeterminate permit, pursuant to the provisions of Chapter 278 of the General Laws of Minnesota for the year 1921.

7. That on the 27th day of May, 1921, your complainant filed with the Railroad and Warehouse Commission of the [fol. 9] State of Minnesota an application for said Commission to fix and establish a fair value of the Railway property of your complainant within the City of Duluth as an operating system and to fix and establish rates of fare to be charged by your complainant for carrying passengers within the City of Duluth under and in accordance with the terms of Chapter 278 of the General Laws of Minnesota for the year 1921 which rates of fare shall yield to complainant a reasonable return on the fair value of its street railway property within the City of Duluth as an operating system, a true and correct copy of said petition without the exhibits attached thereto being hereto attached and marked Exhibit "B" and made a part hereof, the same as though the same were fully incorporated herein in detail.

8. That thereupon and pursuant to the terms of Chapter 278, General Laws of Minnesota for the year 1921, it became the duty of said Commission to proceed with due diligence to examine and appraise the street railway property of complainant in the City of Duluth and to fix and determine a fair value of such street railway property and to fix and establish rates of fare to be charged by your complainant for carrying passengers within the City of Duluth which rates of fare when established should yield to complainant a reasonable return on the fair value of its street railway property within such City as an operating system.

9. That thereafter such proceedings were had pursuant to which said Commission attempted to fix and determine the fair value of such street railway property and to fix and establish rates of fare which should yield to complainant a reasonable return on the fair value of such street railway property as an operating system, and such Commis- [fol. 10] sion on the 13th day of July 1922, made and filed an order, a true and correct copy of which is hereto attached and made a part hereof as fully as though the same were fully incorporated herein in detail, and marked Exhibit "C."

10. The Commission found a total value, as of December 31, 1921, of $4,599,978.22, summarized as follows:

Physical property undepreciated, excluding land	$3,940,000 00
General overheads	550,000 00
Power Contract	110,000 00
Total	$4,600,000 00
Depreciated value (83%)	$3,818,000 00
Lands	140,000 00
Working capital, materials and supplies	135,000 00
Going Concern	500,000 00
	$4,593,000 00
Additions to December 31, 1921	6,978 22
Grand Total	$4,599,978 22

In and by said order said Commission failed to find the full fair value of complainant's street railway property in

the City of Duluth as an operating system, and among other things:

(a) The Commission by its order fixed the depreciated value of complainant's physical property, excluding lands, working capital, material and supplies, at 83% of $3,940,000.00 or $3,270,000.00, while the fair value of complainant's said physical property, allowing depreciation at the rate fixed by the Commission and basing the value upon the average prices prevailing during the ten year period, 1912-1921, inclusive, as agreed upon between experts for the City and the complainant, is not less than $4,037,483.00, and the fair value is not less than said sum.

(b) The Commission found General Overheads in an amount equal to 14% of the physical property and depreciated this amount by 17%, using the same rate and same percentage of depreciation, basing the overheads upon the values based on a ten-year average, gives a general overhead depreciated of $565,245.00.

(c) The Commission found a value in the complainant's power contract of $110,000.00, which it depreciated by 17%. The complainant contends that the value of its contract was more than $110,000.00, but upon this finding of value by the Commission it is clear that the amount should not be depreciated.

[fol. 11] (d) The Commission found the value of the complainant's lands to be $140,000.00.

(e) The Commission found material and supplies of the value of $105,000.00.

(f) The Commission by its order found that complainant should be allowed as working capital the sum of $30,000.00. Your complainant avers that such sum should have been not less than $87,312.00, and avers that it has been necessary during several years last past to keep on hand more than that sum of money to provide for current construction and properly maintain and operate said system of street railways.

(g) The Commission by its order refused to take into consideration any of the costs incurred by complainant in financing its property, and your complainant avers that

such cost has been not less than $89,075.00, and your complainant verily believes that such cost has been not less than the sum of $308,266.00.

(h) Said Commission by its order failed to give any value to or take into consideration the sum of $6,385.00 expended by your complainant in capital expenditures which were not apparent in the inventory of complainant's property as filed with said Commission.

Recapitulating the items set forth in this Paragraph 10, using the ten-year average as a basis of the physical value, basing the General Overheads upon this value and determining the amount in the manner used by the Commission, giving the value of the power contract as found by the Commission, undepreciated, and using the Working Capital as claimed by the complainant, the Cost of Financing as found by the City's expert, and Going Concern value found by the Commission, we have the following:

(a) Physical property, excluding lands and materials and supplies, ten-year average cost as agreed upon between the experts for the City and the complainant and depreciated on the basis found by the Commission	$4,037,483 00
(b) General Overheads at the rate as found and depreciated by the Commission	565,245 00
(c) Power Contract, as found by the Commission	110,000 00
(d) Lands, as found by the Commission	140,000 00
(e) Materials and supplies, as found by the Commission	105,000 00
(f) Working Capital, as claimed by the complainant	87,312 00

[fol. 12]

(g) Cost of Financing, as found by the City Expert	89,075 00
(h) Expenditures not apparent in inventory, as claimed by the complainant	6,385 00
(i) Going Concern value, as found by the Commission	500,000 00
Total	$5,640,500 00

The complainant contends that the above amounts in a number of cases as specified in the foregoing paragraph are too low, and that the full value should not be less than as shown by the following:

(a) Physical property, excluding lands and materials and supplies, ten-year average cost as agreed upon between experts for the City and the complainant and depreciated on the basis found by the Commission	$4,037,483 00
(b) General Overheads as claimed by the complainant, undepreciated	950,656 00
(c) Power contract, as found by the Commission, undepreciated	110,000 00
(d) Lands, as found by the Commission	140,000 00
(e) Materials and supplies, as found by the Commission	105,000 00
(f) Working Capital, as claimed by the complainant	87,312 00
(g) Cost of Financing, as found by the City's expert	89,075 00
(h) Expenditures, not apparent in inventory	6,385 00
(i) Going Concern value, as claimed by the complainant	1,261,574 00
Total	$6,787,485 00

Your complainant avers that said sum of $6,787,485.00 is less than the present fair value of complainant's property, and complainant alleges that the fair value of its said property as an operating system is not less than $7,000,000.00.

[fol. 13] 11. That in and by said order said Commission fixed and established a rate of fare to be charged by your complainant for carrying passengers within the City of Duluth of 6¢ cash, and five tickets or tokens good for rides for 25¢, effective August 1, 1922, and complainant avers that such rate of fare so established will not yield a reasonable return on the fair value of complainant's street railway property in the City of Duluth as an operating system. Your complainant further avers that it verily believes that operating under said order not over five per cent of its passengers will pay a cash fare and that at least ninety-

five per cent of its passengers will purchase five tickets or tokens for 25 cents, in which event the passenger revenue of complainant will be increased not to exceed $13,000.00 per year, while the added cost to complainant of the tickets or tokens to be used by passengers and accounting for tickets and registration of fares will be more than $5,800.00 per year.

12. Said Commission by its order estimated that your complainant would carry 27,030.00- revenue passengers during the year 1922, using as a basis therefor the number of passengers which were carried in the first four months of the year 1922. During the first six months of the year 1921 your complainant carried in the City of Duluth 14,-051,651 passengers and for the last six months of the year 1921 13,195,265 passengers; for the first six months of the year 1922, 13,038,686 passengers, or a decrease, compared with the first six months of the year 1921 of 7.2%. If the same percentage of decrease continues for the last six months of the year 1922, as your complainant believes it will, then the passengers carried for the last six months in 1922 will be not more than 12,245,206, making the total number of passengers for the year 1922 not more than 25,-[fol. 14] 283,892, which would yield a passenger revenue of $1,264,194.60 at the rate of fare of five cents per passenger, with other operating revenues of $12,182.16, making a total operating revenue of $1,276,376.76, and that the operating expense of complainant, as complainant verily believes, in the year 1922, will be not less than $1,134,479.57, which will yield complainant a sum as operating income not in excess of $141,987.19. During the first five months of the year 1922, the actual operating income under a five cent fare was $65,411.46. Said Commission found that on the valuation as established by it, it will be necessary for your complainant to secure an operating income of $345,-000.00 in order that it may earn a rate of return of 7½ per cent, and found that to do this it was necessary to increase the rate of fare so as to produce an additional $95,-000.00. However, your complainant verily believes that under the rate of fare as established by the Commission it will secure an operating income of not in excess of $141,-897.19 which is approximately $203,000 less than the

amount which said Commission found that your complainant should have as an operating income.

The said sum of $141,897.19 will yield to your complainant only 3.08% return on the value of complainant's property as fixed and determined by said Commission and approximately only 2% on the actual value of your complainant's property.

13. That said Commission by its order allowed annual depreciation in the sum of $19,000 less than claimed by your complainant and refused to allow by its order the deduction from gross earnings of the Federal Income Tax required to be paid by your complainant.

14. That said commission by its order found that your complainant was entitled to a rate of return of 7½ per cent [fol. 15] on the value of its property, which rate of return your complainant avers to be unreasonably low and your complainant avers that such rate of return should be not less than 8 per cent on the value of complainant's property.

15. That during the time complainant has furnished street railway service to the public in the City of Duluth it has never earned a reasonable return upon the fair value of the property used by it and useful in furnishing such service.

16. That the management of complainant has at all times been efficient and economical and a rate of fare of 7¢ cash with four tickets or tokens, each good for one ride, for 25 cents, is no more than sufficient to enable your complainant to pay expenses, including taxes and depreciation, and to permit complainant to earn a reasonable return on the fair value of its property used in the street railway service in the City of Duluth as an operating system.

That at said hearing before said Commission, the expert for the City of Duluth estimated that such rate of fare would yield to complainant, if the same were in effect in the year 1922, an operating income of $405,111, while your complainant estimated that such rate of fare would yield an operating income of $390,911.

17. Complainant further alleges that said defendant, The Railroad and Warehouse Commission and the individual defendants are threatening to enforce and are about to en-

force said order against this complainant in manners and ways unknown to this complainant.

18. Complainant further avers that for the foregoing reasons, among others, the said order of the 13th day of July, 1922, is unreasonable, unjust and oppressive, and if enforced, as said defendants now threaten to enforce it, [fol. 16] it will, among other things, subject this complainant to great and irreparable loss, damage, expense and inconvenience, and will confiscate the property of this complainant, will deprive it of its property and rights without due process of law, and will deny to it due protection of the law, all contrary to and in violation of Section 10 of Article 1 of the Constitution of the United States and Section 1 of Article XIV of the Amendments of the Constitution of the United States.

19. That complainant has no adequate remedy at law.

20. That the Railroad and Warehouse Commission and the other defendants, officers and agents thereof, are nevertheless and are now actively preparing to bring proceedings against complainant to compel obedience to said order, Exhibit "C" and to make and enforce the rates of fare as specified in said order, Exhibit "C" and to otherwise interfere with the property rights of complainant, and should complainant fail to observe the rates and charges specified in said order, Exhibit "C" or any rates of fare not sanctioned by the Railroad and Warehouse Commission, the defendants will, unless restrained by an order of this Court, institute and cause to be instituted proceedings to compel compliance with said order, Exhibit "C," and complainant, its directors, officers, agents and employees will be subject to a multiplicity of suits and thereby complainant will be forced to submit to the confiscation of its property without due process of law, all in violation of its rights under the Constitution of the United States as hereinbefore alleged.

That unless defendants are restrained and enjoined as herein prayed, complainant's patrons will be induced and caused to resist payment of any rate of fare other than that provided in said Exhibit "C." That because of the [fol. 17] nature of the business of complainant and the small sums of money paid by its patrons as and when they

ride, it is impractical for complainant to force collection thereof by action at law.

That complainant has no adequate way to enforce and collect its charges except by refusing service to its patrons and its patrons will, as complainant believes, institute large numbers of suits to restrain complainant from refusing service and complainant will thereby be subjected to an endless multiplicity of suits, and complainant's property will be confiscated to complainant's irreparable loss and damage, as hereinbefore alleged.

In consideration whereof and for as much as the complainant is remediless in the premises by the strict rules of common law and can only have relief in a court of equity where matters of this kind are properly cognizable and relievable, the complainant prays that said order be declared to be unreasonable as well as in violation of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments of the Constitution of the United States and therefore void and of no effect, and that the Railroad and Warehouse Commission of the State of Minnesota and the said O. P. B. Jacobson as Chairman thereof, Fred W. Putnam and Ivan Bowen, Commissioners thereof, and all other officers, agents and servants of the said Commission be temporarily and permanently restrained and enjoined from any attempt, by any action or other proceeding, to compel the said The Duluth Street Railway Company to comply with said order or in any manner interfering with the property or operations of the complainant under color, or by reason of said order, and from interfering with complainant charging such rate of fare for carrying passengers within the said City of Duluth as shall yield to complainant a [fol. 18] reasonable return on the fair value of its street railway property within such City as an operating system, which is not less than 7 cents cash fare and 4 tickets or tokens, each good for one ride, for 25 cents.

That a temporary injunction be issued during the pendency of this action restraining said defendants from doing those things which are herein sought to be permanently enjoined.

That a restraining order be issued on the presentation of this complaint restraining said defendants from doing those things which are herein sought to be permanently enjoined.

That complainant have such other or further relief as may be just in the premises.

May it please Your Honor to grant unto the complainant a writ of subpœna of the United States of America, issuing out of and under the seal of this Honorable Court, directed to the Railroad and Warehouse Commission of the State of Minnesota, O. P. B. Jacobson, Fred W. Putnam and Ivan Bowen, commanding them and each of them, on a day certain therein to be named and under a certain penalty, to be and appear before this Honorable Court and then and there to answer but not under oath, answer under oath being hereby expressly waived, all and singular the premises, and to attend to and for and abide by such order, direction or decree as may be made against them in the premises, and that until the further order of this Court a restraining order may be issued restraining the defendants as aforesaid. And the complainant will ever pray.

Washburn, Bailey & Mitchell, Counsel for Complainant, 1200 Alworth Building, Duluth, Minnesota.

[fol. 19] *Duly sworn to by Herbert Warren. Jurat omitted in printing.*

[fol. 20] EXHIBIT "A" TO BILL OF COMPLAINT

Office of City Clerk, Duluth, Minnesota

April 30th, 1921.

I, F. D. Ash, City Clerk of the City of Duluth, in the State of Minnesota, do hereby certify that I have compared the annexed copy of Declaration and Consent of the Duluth Street Railway Company, with the original filed in the office of the City Clerk, of Duluth, Minnesota, on the 28th day of April, 1921, at 9:50 o'clock A. M., and that the same is a true and correct copy thereof, and the whole thereof, and a true and correct transcript therefrom.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of the said City of Duluth, this 30th day of April, 1921.

F. D. Ash, City Clerk, City of Duluth, Minn. (Corporate Seal of City of Duluth.)

[fol. 21] Duluth, Minn., April 23, 1921.

To whom it may concern:

The Duluth Street Railway Company, a corporation organized and existing under the laws of the State of Minnesota and now owning and operating the street railway properties within the City of Duluth and State of Minnesota, hereby declares that it desires that each of the grants contained in the following, to-wit:

Chapter 200, Special Laws of the State of Minnesota for 1881, entitled "An Act Conferring Certain Rights upon The Duluth Street Railway Company";

An ordina-ce of the City of Duluth entitled "An Ordinance Granting to The Duluth Street Railway Company the Right to Construct, Maintain and Operate an Elevated Inclined Street Railway in the City of Duluth," approved February 26, 1890, as the same has since been amended;

An ordinance of the Village of West Duluth entitled "An Ordinance Granting to The Duluth Street Railway Company the Right to Construct, Maintain and Operate Street Railways in the Village of West Duluth," approved July 14, 1891;

An ordinance of the City of Lakeside entitled "An Ordinance Granting to Lakeside Railway Company the Right to Construct, Maintain and Operate an Electric Street Railway in the City of Lakeside," passed July 11, 1892, and now owned by The Duluth Street Railway Company;

An ordinance of the City of Duluth entitled "An Ordinance Confirming and Declaring that Certain Ordinance of the Village Council of the Village of Park Point entitled 'Ar Ordinance Granting Right of Way to the Minnesota Point Street Railway Company,' approved June 23, 1887, and Further Providing that the Minnesota Point Street Railway Company Release and Surrender to the City of Duluth its Rights and Privileges in, upon and over Certain Streets, Avenues and Highways in said City," approved December 10, 1892, and now owned by The Duluth Street Railway Company;

and any other grant from the State of Minnesota, or any municipality, under which said The Duluth Street Railway Company now operates any street railway line or street railway property within said City of Duluth, shall become

an indeterminate permit under the provisions of Chapter [fol. 22] 278 of the Laws of Minnesota for 1921 (Senate File No. 687), and consents that the terms of said Chapter 278 shall apply to and govern the ownership, control, management, maintenance and operation of the street railway property of said The Duluth Street Railway Company.

In witness whereof, this written declaration has been executed this 23rd day of April, A. D. 1921, by said The Duluth Street Railway Company by authority of its Board of Directors.

The Duluth Street Railway Company, by A. M. Robertson, President.

In presence of H. M. Warren, H. A. Carmichael.

Attest: S. L. Reichert, Secretary. (Corporate Seal of the Duluth Street Railway Company.)

State of Minnesota,
County of St. Louis, ss:

On this 23rd day of April, A. D., 1921, before me, a Notary Public within and for said County, personally appeared A. M. Robertson and S. L. Reichert, to me personally known, who, being each by me duly sworn, did say that they are respectively the President and the Secretary of the Duluth Street Railway Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its Board of Directors, [fol. 23] and said A. M. Robertson and S. L. Reichert acknowledged said instrument to be the free act and deed of said corporation.

H. A. Carmichael, Notary Public, St. Louis County, Minnesota. My commission expires May 10, 1924 (Notarial Seal.)

(Cover)

On April 23, 1921, a duplicate of the enclosed document was presented to the City Clerk for filing but upon advice of the City Attorney same was not filed.

F. D. Ash, City Clerk.

Filed in Office of City Clerk, Duluth, Minn., 10 o'clock Apr. 28, 1921. F. D. Ash, City Clerk.

[fol. 24] Exhibit "B" to Bill of Complaint

Before the Railroad & Warehouse Commission of the State of Minnesota

In the Matter of the Application of The Duluth Street Railway Company to Have Fixed and Established, Increased Rates of Fare to be Charged by Such Street Railway Company for Carrying of Passengers Within the City of Duluth Pursuant to Chapter 278, General Laws of Minnesota, for the Year 1921.

Petition

To the Railroad & Warehouse Commission of the State of Minnesota:

Your Petitioner, The Duluth Street Railway Company, respectfully petitions and shows to your Honorable Body:

1. That your petitioner is a corporation, duly organized and existing under and by virtue of the laws of the State of Minnesota.

2. That on the 28th day of April, 1921, your petitioner was the owner of certain franchises to operate a street railway system in the City of Duluth.

3. That on the 28th day of April, 1921, your petitioner filed with the City Clerk of the City of Duluth, a Declaration and Consent pursuant to provisions of Chapter 278, General Laws of Minnesota for the year 1921, and the City Clerk of the City of Duluth duly filed said Declaration and Consent, and on said day issued to your petitioner, a certificate that such Declaration and Consent had been filed in his office, a true and correct copy of said certificate and said Declaration and Consent being hereto attached and made a part hereof as fully as though the same were herein incorporated in detail, marked Exhibit A.

4. That on the 29th day of April, 1921, said certificate [fol. 25] was duly filed with the Secretary of State of the State of Minnesota.

5. That your petitioner owns, operates, manages and controls a street railway system in the City of Duluth under and pursuant to an indeterminate permit pursuant to the provisions of Chapter 278, General Laws of Minnesota for the year 1921, and the fair value of such street railway property within the City of Duluth is in excess of $6,000,000.00.

6. That there is attached hereto and made a part hereof, marked Exhibit B, balance sheets as of December 31, 1918, December 31, 1919, and December 31, 1920, showing in detail the financial status of said company on the dates above specified.

7. That there is attached hereto and made a part hereof marked Exhibit C, detailed statement of the income account of said company for the years 1918, 1919 and 1920.

8. That there is attached hereto and made a part hereof marked Exhibit D, a statement showing the gross operating revenues, the gross operating expenses, and the net operating revenues of said Company for the first four months of the year 1921.

9. That there is attached hereto and made a part hereof, marked Exhibit E, a schedule showing in detail the increase in wages paid by said company from January 1, 1916, to January 1, 1921.

10. On January 10, 1921, the City Council of the City of Duluth ordered petitioner to change its schedule and furnish a much increased service in the City of Duluth, which order when complied with would require petitioner to purchase new equipment at a cost of approximately $196,000.00 and would necessarily result in an increased cost of operation of more than $145,000.00 per year.

11. It is necessary that petitioner relay its tracks on Superior Street in the City of Duluth from Third Avenue [fol. 26] East to Eighth Avenue West in the immediate future, which work, if done in connection with the repaving of said street by the City of Duluth, will cost petitioner

approximately $144,246.63, and if the work is done by petitioner at a time when the City of Duluth is not paving said portion of said street, then said work will cost petitioner approximately $201,921.63.

12. That there is attached hereto and made a part hereof, marked Exhibit F, an estimate of additional rolling stock equipment, amount required for track maintenance, amount required for repairs to car house, office buildings and trainmen's quarters, and amount required for relaying and paying portion of paving cost on estimate requirements for the years 1921, 1922 and 1923, inclusive of the hereinbefore mentioned cost of relaying tracks on Superior Street.

13. That the City of Duluth has made claims against petitioner in excess of $108,000.00 on account of paving in and about track space on various streets in the City of Duluth, which the City claims is owing to it by petitioner; that petitioner has denied liability on account of said claims and litigation is now pending on said claims. That if it should be finally determined that petitioner is indebted to said City by reason of the claims so made, that petitioner is without funds with which to pay the same.

14. Pursuant to said franchises or grants that became an indeterminate permit on the issuance of the certificate filed with the Secretary of State as alleged in Paragraphs Nos. 3 and 4 hereof, the rate of fare charged by petitioner for transporting passengers within the City of Duluth is five cents (5¢) per passenger.

15. That said rate of fare is not sufficient to maintain the present service and provide for the maintenance of said railway system and is not sufficient to provide for a [fol. 27] reasonable rate of return on the value of said street railway property as an operating system.

Wherefore, Your petitioner prays that your Honorable Commission,

1. Fix and establish the fair value of the street railway property of petitioner within the City of Duluth as an operating system;

2. Fix and establish rates of fare to be charged by petitioner for carrying passengers within the City of Duluth under and in accordance with the terms of Chapter 278, Laws of Minnesota for 1921, which rates shall yield to petitioner a reasonable return on the fair value of its street railway property within the City of Duluth as an operating system;

3. Establish an emergency or temporary rate of fare of seven cents (7¢) payable in cash with four (4) rides to be evidenced by tokens, to be sold for twenty-five cents (25¢), to be charged by petitioner within the City of Duluth, pending a valuation of its street railway property as an operating system and the establishment of a fare based upon the findings of the Commission after determination of a rate base and operating requirements.

Duluth Street Railway Company, by Washburn, Bailey & Mitchell, Its Attorneys.

STATE OF MINNESOTA,
County of St. Louis, ss:

Herbert Warren, being first duly sworn says that he is the Vice-President and General Manager of the The Duluth Street Railway Company, Petitioner in the above entitled action; that he has read the foregoing petition and knows the contents thereof, and that the same is true according to his own knowledge, except as those matters therein stated [fol. 28] upon information and belief, and as to those matters he verily believes it to be true.

Herbert Warren.

Subscribed and sworn to before me this 13 day of May, A. D. 1921. H. A. Carmichael, Notary Public, St. Louis County, Minn. My commission expires May 10, 1924. (Notarial Seal.)

[fol. 29] EXHIBIT "C" TO BILL OF COMPLAINT

BEFORE THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA

In the Matter of the Application of THE DULUTH STREET RAILWAY COMPANY to Have Fixed and Established Increased Rates of Fare to be Charged by Such Street Railway Company for Carrying Passengers Within the City of Duluth, pursuant to Chapter 278, General Laws of Minnesota, for the Year 1921.

The foregoing matter came on for hearing pursuant to notice duly given at the City Hall, in the City of Duluth, Minnesota, on the 10th and 11th days of January, 1922, and at the office of the Commission, State Capitol, St. Paul, Minnesota, on January 30th and 31st and February 1st, 1922.

There appeared on behalf of the petitioner, Washburn, Bailey & Mitchell, Attorneys, by Oscar Mitchell and J. A. Carmichael; J. B. Richards, City Attorney of the City of Duluth appeared on behalf of the city.

The Duluth Street Railway Company is a corporation, duly organized under the laws of the State of Minnesota, and owns and operates a street railway system within the City of Duluth, State of Minnesota. This proceeding is upon application of said Duluth Street Railway Company under Chapter 278 of the Laws of 1921, petitioning this Commission to investigate and determine the fair value of the property of the said Duluth Street Railway Company, situated within the City of Duluth, and to fix and establish a reasonable rate of fare, which will produce a reasonable return on the fair value of the property of said company as an operating system. Under said Section 9, Chapter 278, the Commission is directed as follows: "If the petition be to fix a rate of fare the Commission shall, after hearing as herein provided, fix a rate of fare to be charged by the street railway, which will yield only a reasonable return [fol. 30] on the fair value of the street railway property of such street railway within the city, as provided by this act."

Pursuant to provisions of said Chapter the City of Duluth has caused the property of the petitioner to be examined and appraised and has submitted such appraisal as a

part of the record in this case, to the Commission for its consideration. The representatives of the city and the company have in many respects agreed upon the inventory and appraisal submitted in these proceedings. The property owned by the Duluth Street Railway Company has been appraised upon four different bases. These bases are as follows:

1. Upon the cost of reproduction of the property based upon 1915 prices.

2. Upon the cost of reproduction of the property based upon the average of prices for ten years ending July 1, 1921.

3. Upon reproduction cost based on prices as of July 1st, 1921, and

4. Upon a reproduction cost, based upon units used in the actual construction of the property, or an investment basis.

The engineers representing the city and the company have agreed upon an inventory of the property and the appraisal of this inventory so far as it affects all the physical property, excepting land, working capital, general overheads, (engineering and superintendence, administration, organization and legal expenses, taxes during construction, interest during construction) and cost of financing, development costs or going concern value cost of power contract, and accrued depreciation or present per cent condition of the property. The agreed figures of the physical property with the above exclusions, undepreciated, are as follows:

1915 prices	Ten-year average	1921 costs	Reproduction of investment basis
$3,488,161.00	$4,864,437.00	$6,308,966.00	$3,487,020.00

These figures demonstate that there has been an increase [fol. 31] in replacement costs for this property, that at the present time we are on a higher cost basis than that in existence during the period of construction of this property, and that there is an appreciation in value to be reflected in the final value for rate-making purposes.

The City and Company have introduced figures to represent estimated cost of reproducting the property on the

investment basis, or, in other words, to build up a figure to represent the original investment of the property as it exists today. The City presents a total figure, undepreciated, of $4,504,638.00, while the Company claims $6,336,093.00. The investment account of the company, as of July 1, 1921, shows approximately $4,800,000. An analysis of the investment account shows that there is included therein money placed in the property in the early days of the company, and which property thus acquired has either been retired or has become obsolete, so that the present investment account contains the cost of certain items which are hereinafter discussed under "Going concern Value" and disallowed by the Commission.

Real Estate Values

The Minnesota rate case, 230 U. S., 351, seems to have settled the rights of the company in reference to the value to be placed upon the lands used and useful in the operation of its property. In that case the Supreme Court says that the company is entitled to "a value of these lands equal to the fair average market value of similar land in the vicinity." The testimony of the Company is that of members of the Realty Board of the City of Duluth, with long standing experience in the appraisal of lands within the City of Duluth. They testify to the present fair value of the lands and state that the value of these lands is $150,735.00. The City, through its assessor, placed a value on [fol. 32] these lands of $118,094.00. A portion of this land is used jointly for the operation of the Superior properties, and eliminating such portion that is not properly chargeable to Duluth, the Commission finds that the fair value of the lands of the petitioners, used and useful in the furnishing of street car service within the City of Duluth, is $140,000.00.

Working Capital

A utility is entitled to have added to the value of the physical property such additional sum as is necessary for the company to keep on hand or in use for necessary expenditures in operation, in advance of receipts in the form of earnings from service rendered. The City and the Company have agreed upon the amount invested in materials

and supplies and this sum is found to be $105,787.00. The balance of the working capital to be allowed is disputed, the Company claiming the sum of $87,312.00 and the City allowing $24,213.00. Mr. Drum, the Company's engineer, bases his estimate upon an average of one-half month's current operating expenses and six months capital expenses, based on the year 1920. The one-half of capital expenditures amounted to $32,775.27. In figuring the value of the physical property an allowance is made for interest during construction, and in the rate of return allowed the company, the cost of financing is included. The allowance of one-half of the year's expenditures on new construction would appear to overlap to some extent the interest during construction, and if reasonable, contracts for financing were entered into, it would not be necessary for the company to hold in the bank so large a proportion of the cost of its total construction program. If any allowance should be made for funds held for construction work, it should be in connection with the overheads or interest requirements during construction, rather than in connection with the [fol. 33] funds held for operation. Undoubtedly it is necessary for the company to maintain funds that are the property of the stockholders to meet certain expenditures, such as for insurance, taxes, incidental expenditures and a proper reserved deposit in the bank. In the case of a street car company the revenues are received as cash payments at the time of rendering service, and it would be unnecessary for the company to expend any large proportion of the costs of operation in advance of the receipts from operating. The Commission finds that $30,000.00 is a reasonable amount for working capital for the Duluth Street Railway Company in addition to the sum for materials and supplies.

General Overhead Expenses

The agreed inventory and appraisal presented by the City and the Company, including the physical property and excluding land and certain intangibles, includes what is sometimes considered as general overhead expenses, to-wit: Storeroom and material yard expenses, construction tools, loss and waste, special supervision, omissions and contingencies. It is agreed that there is not included

engineering and superintendence, administration, organization and legal expenses, taxes during construction and interest during construction. The parties to this proceeding differ as to the amount to be allowed for these last enumerated general overheads. The expert for the City purports to follow what is termed the Wisconsin Commission's method under which, after considerable study the Wisconsin Commission has authorized an allowance of 15% to cover all of the general overheads, which, in the present case, includes part of the overheads which are incorporated in the present appraisal in the agreed unit prices. The contention of the City is that as some of the general overheads are included in the unit prices, the balance of overheads should be less than 15%, and by computation the City claims, depending upon basis of valuation that there should be between 10.25% and 14% additional [fol. 34] for the balance of the general overheads. The Company's engineer submitted specific amounts for each of the general overheads enumerated and not included in the original units used, his total varying from 18 to 20 per cent, depending upon basis of valuation. After reviewing the evidence the Commission finds that a reasonable allowance for General Overheads is as follows:

Engineering and Superintendence	5%
Administration, Organization and Legal Expenses	2%
Taxes During Construction	2%
Interest During Construction	5%
or a total of	14%

on the physical inventory of the property for these items.

Cost of Financing

The Company maintains that to the value of the property, including physical value, materials and supplies, general overhead and working capital, there should be added the sum of 5% as a cost of financing. The City contends that the cost of financing should be considered in determining the rate of return. There is no doubt that in obtaining funds for construction of the plant the Company must pay certain charges for obtaining such funds in ad-

dition to the going interest rate. In case of original money going into property which is represented by stock, there is some basis for adding the cost of financing to the cost of construction of the property. In case of bonds and notes of definite dates of maturity the benefit received from the cost of financing is for a limited period and when the time for renewal of bonds or notes arrives, the entire value of the original financing has been exhausted and should be amortized. Over a long period of years with changing relationships between stock issues and other security issues, the most practical method of providing for the cost of financing, in this case, is by giving due credit for such costs in the rate of return allowed upon the fair value of the property.

Going Concern Value

Chapter 278 of the Laws of 1921, under which this pro- [fol. 35] ceeding was instituted, provides in Section 8 thereof, "in establishing any rate of fare, the Commission, or the court on appeal, shall consider the fair value of the street railway property of the street railway within such city as an operating system." It has been a well recognized principle that a utility in the determination of its fair value for rate making purposes should have included what has been termed as going concern value, or as is designated in the above quotation, value as "an operating system." The Company is contending for an addition to the physical value of the present property used and useful in the business, certain sums aggregating $693,688.00 for expenditures or investments in property, which is not now in existence, or is not used in the rendering of street car service. These items are specifically designated as follows:

(a) Horse car period, 1882-1890.

(b) Electrical development period, 1890-1907.

(c) Tracks superseding on account of civic improvements.

(d) Expenditures on account of municipal improvements.

In the conduct of a business such as the street car industry, there are constantly arising changes in the mode and form of the physical united used in such an enterprise. It is a well established practice, based on sound economics,

that reserves should be established to provide for the replacement of property, either destroyed or become obsolete due to development of the art. If the company failed to build up reserves from the so-called horse-car period, which ended in 1890, any loss due to the change in the property should have been amortized in the immediately succeeding years. This statement also applies to each of the succeeding items enumerated above and claimed by the company. To capitalize such items at the present time would incorporate in the property a fictitious value, which has long since ceased to exist.

[fol. 36] The Company further claims as elements of going value the cost of unifying the system and, second, loss of interest during operation. The Supreme Court of the United States in Galveston Electric Co., v. the City of Galveston et al., decided April 10, 1922, says: "If net deficits so estimated were made a factor in the rate base, recognition of 8% as a fair return on the continuing investment would imply substantially a guarantee by the community that the investor will net on his investment ultimately a return of 8% yearly with compound interest on deferred payments" * * * also the court says: "past losses obviously do not tend to prove present values."

Going value then does not primarily represent losses nor is it to be measured by losses. Going value must represent the cost or necessary expenditures of money for the conversion of a bare physical plant to a going, operating, service-giving concern. This includes such elements as the cost of creating the personnel of an operating force that is sufficient and the cost of attracting sufficient patronage to pay the operating expenditures. In an enterprise that requires contact between the company and its patrons by contract, there is some basis of figuring this cost of acquisition of business. In street car operation this cost is represented by costs of advertising and other manner of educating the people to using the car service, which would probably include certain losses in a limited initial period. In analyzing all of these factors and after due consideration the Commission finds a reasonable value to be added to the physical value of the property of the Duluth Street Railway Company, in order to make said property an operating system, the sum of $500,000.00.

Power Contract

Prior to 1907 the company had generated its own elec- [fol. 37] tricity in a steam generated plant owned and operated by the Company. In 1907 a contract for electric power was entered into with a company developing water power, which contract is still in force and continues until 1931. This contract for electricity generated by water power, has proved to be very advantageous and without question, is one of the main factors that has enabled the Duluth Street Railway Company to continue to operate at a five cent fare without being forced into bankruptcy. The steam plant superseded by the electric power contract represents an investment of $371,939.83. This plant has been dismantled and is not now in existence. A portion of the plant has been charged off the books through the depreciation reserve. The Company claims it is entitled to have substantially the total investment in this plant incorporated in the present value of the property as the value of the power contract. Where the Company entered into an advantageous and farsighted contract, it should be allowed to profit thereby, but also, the patrons of the road are entitled to some of the advantage. The present contract expires in 1931, at which time the entire value of the contract has expired, so that the present value of this power contract is limited to the value of the remaining years or life of the contract. The Commission finds the reasonable value of the power contract for the remaining life of the same to be the sum of $110,000.00.

In summary, the Commission finds that the fair value of the property of the Duluth Street Railway Company, within the City of Duluth, used and useful in furnishing the street car service, undepreciated, is the sum of $5,375,000.00. The present physical condition of the property of the street railway company is undoubtedly lower than that which it should be under ordinary conditions. During the past few years the Company has inaugurated the system of retrenchments, which has resulted in certain portions of the property being in poor physical condition. The Company's figures and the figures presented by the City do not vary greatly. The comparison shows that the Company arrives at a condition per cent of the property averaging for the

[fol. 38] four bases of value presented of 86.02%, while the City uses 83.57%. The Company fails to allow depreciation on the general overhead excepting engineering and superintendence, while the City applies a per cent to all the general overheads. The Commission finds after considering all the evidence that the present condition per cent of the property is approximately 83% and that this condition per cent of the property, in order to arrive at the present value, should be applied to the items including physical plant, less lands and plus the general overheads herein allowed.

The Commission finds that as of July 1, 1921, the fair value of the street railway property of the Duluth Street Railway Company, within the city of Duluth, is the sum of $4,593,000.00, summarized as follows:

Physical property undepreciated, Excluding land	$3,940,000 00
General overheads	550,000 00
Power Contract	110,000 00
	$4,600,000 00
Depreciated value	3,818,000 00
Lands	140,000 00
Working Capital, materials and supplies	135,000 00
Going Concern	500,000 00
	$4,593,000 00

The Company has made certain additions to the property since said date, July 1, 1921, and from the report of the Company, the net additions from July 1, 1921 to December 31, 1921 was $6,978.22.

Operating Expenses

The Company's figures show gross operating expenses, including depreciation and taxes for the year ending December 31, 1921 as $1,197,475.95. In calculations to determine reasonable operating expenses for 1922 it is necessary to consider several important factors.

[fol. 39] Depreciation Reserve

In the early history of the Company there was no depreciation reserve separately set up and items of renewals were charged through the surplus account. Commencing in 1905 it became the practice of the Company to set aside a reserve for this depreciation. The bases that the company has adopted have varied from year to year, but in recent years, 1917 to 1921, the amount has varied only from $102,000.00 to $134,000.00 and during this period the balance in the reserve fund has increased from $537,-139.11 to $972,806.38. It would appear that the company has failed to expend a proper amount on renewals during the past five years. It also appears that the amount set aside for depreciation reserve and charged in operating expenses, in the past five years, has on the whole been somewhat in excess of the actual requirements of the company. The Company's charge to operating expenses for reserve fund in 1921 was $134,000.00. This is approximately 3% on the value found by the Commission. In view of the fact that the present reserve fund is reasonably adequate for the proper protection of the property, being in excess of 20% of the total present value, the Commission believes that the amount to be included in operating expenses for depreciation can be somewhat reduced and has adopted a figure of 2½% to be applied upon the depreciable property, which produces a figure of $115,000.00, reducing the allowance asked for by the Company by $19,000.00.

Other Operating Costs

Also adjustments have been made in the operating labor accounts to reflect the present labor costs as compared with the 1921 costs. A reduction has also been made in material costs of 8.3%. With these adjustments we arrive at a figure for the 1922 basis of gross expense, with the [fol. 40] elimination of federal income tax, of $1,111,726.84.

Revenue

A comparison of this adjustment for the year 1921 with the 1922 basis, as compared with the first four months of 1922, equated for a complete year, shows 1922 figures slightly in excess of those herein adopted. This excess,

however, may be accounted for by the unusual operating conditions existing in the month of February 1922. The total revenue passengers during the year 1921 was $27,246,916. The first four months of 1922, equated for the year, shows a slight reduction in the number of passengers for 1922, and by using 27,030,000, being the equated number as based upon the first four months of 1922. and in addition thereto, adding other operating revenues as shown by 1921 report, we have a total gross revenue of $1,365,834.10. This leaves a net revenue from operation of $254,107.26, or about 5.5% upon the value of the property has heretofore found by the Commission.

Rate of Return

The Company contends for a rate of return not less than 8% upon the fair value of the property as found by the Commission. This claim is based upon expert testimony as to the going rate of interest and cost of financing of utility properties during the year 1921 experience and immediately preceding years. It is a well known fact that especially following the war rates of interest went to very high figures, and the financing of loans for public utilities was a very expensive proposition, many large companies paying between 8 and 10 per cent for moneys for financing. In the instant case there is capital stock outstanding of $1,200,000.00 issued at time of reorganization of the properties and there is no evidence of any expense in connec- [fol. 41] tion with the sale thereof. The balance is bonds of $2,516,890.00, and is financed at practically 5.18%, the bonds being 5% bonds. In recent months utilities have financed upon six per cent basis and even less per cent basis. The current rate of interest has materially declined and in consideration of all of these factors the Commission finds that a return of 7½% is a reasonable rate of return for the company to earn, and will produce sufficient revenue to properly finance the Duluth Street Railway Company in its rquirements in the immediate future.

Conclusion

Seven and one-half (7½) per cent of the fair value found by the Commission is approximately $345,000.00, which

necessitates an increase in rate of fare that will produce approximately $95,000.00.

In determination of a rate of fare to be charged by a Street Railway Company the Commission finds that there is a large class of car riders who are the daily patrons of the Company and produce a very large portion of the revenue. The remaining patrons of the Company are transients within the city of individuals who ride occasionally. It is the opinion of this Commission that the daily patrons and supporters of the street railway company who find it necessary to patronize the company going from their home to their work, should have as low a fare as is possible and still maintain the company in a position to furnish reasonable service. The Commission finds that 6 cents cash fare, together with tickets or tokens to be sold five for twenty-five (25) cents, are just, fair and reasonable rates of fare and charges for transportation within the city of Duluth as furnished by the Duluth Street Railway Company, and will yield only a reasonable return upon the fair value of the property of said Company within said city, as an operating system.

[fol. 42] Therefore, it is ordered, That the Commission finds that the fair value of the property of the Duluth Street Railway Company within the city of Duluth, used and useful in giving Street Car Service as of December 31st, 1921, is $4,599,978.22.

Second, That the Duluth Street Railway Company is hereby authorized to charge for its service in the transportation of passengers within the city of Duluth Six (6) cents cash fare, and shall issue tickets or tokens good for rides on its said lines within the city of Duluth and charge therefor not to exceed Twenty-five (25) cents for Five (5) rides, effective August 1, 1922.

By the Commission. Thos. Yapp, Secretary. (Seal.)

Dated at St. Paul, Minnesota, this 13th day of July, A. D. 1922.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed July 29, 1922

Now comes the defendants to the above entitled action and for their joint and several answers to the bill of complaint therein:

I

The defendants admit the allegations of the first six paragraphs thereof.

II

The defendants admit the allegations of the seventh paragraph thereof, and, in respect thereto, allege, that in said application, the complainant also prayed that the said railroad and warehouse commission establish an emergency or temporary rate of fare, pending the valuation of its prop-
[fol. 44] erty; that in response to said application for the establishment of an emergency fare, the said commission conducted hearings, at which witnesses for the complainant and for the city of Duluth appeared and testified, and on the 29th day of August, 1921, issued an order wherein it established an emergency fare of six cents; that the city of Duluth appealed from said order to the district court of St. Louis County and applied to said court for a stay of the same pending a decision on said appeal; that said application for a stay was argued before three judges of said court and the application was granted in an order filed September 13, 1921; that since said time the complainant has taken no steps to have the said appeal decided and to secure to itself the right to collect such emergency fares.

III

The defendants admit the allegations of the eighth paragraph thereof, and in that connection, allege that pursuant to the provisions of section 9 of said chapter 278, Laws of Minnesota, 1921, it was the duty of the city council of the city of Duluth to employ experts to make an appraisal of the property of the complainant, to investigate its books,

accounts and records and secure full information as to operating conditions and expenses for presentation to the said commission in said proceeding.

IV

The defendants admit the allegations of the ninth paragraph, and further allege, with reference thereto, that in said proceeding numerous hearings were held at which numerous expert witnesses appeared and testified on behalf of the complainant and of the city of Duluth; that there was considerable conflict between the witnesses for the com- [fol. 45] plainant on items which should be so included, on the probable future operating expenses of the complainant and on numerous other matters; and that the said order was made only after a thorough consideration and weighing of all of the testimony.

V

As to the allegations of the tenth paragraph the defendants admit that the commission found the total value as therein stated and summarized, and the defendants specifically deny that the commission failed to find the full fair value of complainant's street railway property in the city of Duluth as an operating system, but, on the contrary, the defendants allege that the value found in said order is such full fair value.

Answering the first set of sub-paragraphs lettered (a) to (h):

As to sub-paragraph (a) the defendants admit that the commission fixed the depreciated value of the property mentioned at the sum stated and that there was testimony in said proceeding to the base value found by using average prices prevailing during a ten year period, as alleged; and defendants deny that the amount so found by the use of such average is alone indicative of the fair value of such property; and defendants allege that there was testimony before the commission in said proceeding, as to values of this property, not only upon a ten-year average basis, but upon the historical cost basis, the 1915 cost basis and the July, 1921, cost basis, as well as testimony as to the book cost, the assessed valuation, and a former valuation made for the

city, and that the finding by the commission as to fair value [fol. 46] was based upon a consideration of all of such testimony and not of a single element thereof; and defendants deny the allegation that the fair value is not less than the sum stated.

As to the allegations of said sub-paragraph (b) the defendants admit that the computation contained therein, by which it arrives at the sum stated as the amount of general overheads, is a correct statement of the result which would be arrived at by the application of the percentages used by the commission to the base value, using ten year average costs, but allege that since the base cost to which such percentages are applied is in error, as set forth above, the resulting depreciated value of overheads therein mentioned is likewise erroneous.

The defendants admit the allegations of said sub-paragraph (c) as to the value placed by the commission on the power contract and deny the other allegations thereof.

The defendants admit the allegations of said sub-paragraphs (d) and (e).

The defendants admit the allegations of said sub-paragraph (f) that the commission found that the complainant should be allowed $30,000.00 as working capital. Defendants allege that an additional sum of $105,787.00 was allowed by the commission for materials and supplies; that in complainant's business its revenues are received for service in advance, that under the order of the commission, it will always have on hand a considerable sum received for tickets in advance of their use, and that the amount allowed is adequate. Defendants deny the other allegations contained in said sub-paragraph.

The defendants deny the allegations of said sub-paragraphs (g) and (h).

[fol. 47] As to the allegations contained in the second set of sub-paragraphs, lettered (a) to (i), and the sub-paragraph introductory thereto, of said tenth paragraph, the defendants admit that the amounts stated therein are what they purport to be; but allege that such combination of items is unwarranted as furnishing a reliable or correct conclusion as to fair value for rate making purposes.

As to said sub-paragraph (g) the defendants allege that said city expert contended that such cost should not under

the circumstances, be included in the rate base, but should be considered in the rate of return.

The defendants admit that the complainant contends as stated in the introductory paragraph and the third set of sub-paragraphs, lettered (a) to (i) of said tenth paragraph, and defendants allege that such amounts are excessive and above the fair value thereof to the extent that they exceed the amounts fixed by the commission.

The defendants deny the allegations of the last sub-paragraph of the said tenth paragraph.

VI

As to the eleventh paragraph thereof, the defendants admit the allegations as to the rate of fare prescribed by the commission and deny the other allegations contained therein.

VII

As to the twelfth paragraph the defendants admit the allegation that the commission used the number of passengers mentioned as a part only of the basis of computing the revenues, the allegation as to the number actually carried during the periods mentioned, the accuracy of the [fol. 48] computation as to the number of passengers if the same rate of decrease continues, the amount of operating income found by the commission to be necessary in order to yield a return of 7½ per cent, and the amount of increase found by the commission to be necessary to produce such rate of return, and denies each and every other allegation contained therein.

The defendants allege, in reference thereto, that in estimating the probable number of passengers for 1922, the commission applied to the number of passengers carried for the first four months of 1922 a factor expending the same to a yearly basis, which factor was based, not upon the experience for 1921 alone, but upon the experience of the complainant over a period of years, and that the estimate so made by the commission of 27,030,000 revenue passengers is less than the estimate of 27,200,00 revenue passengers testified to in said proceeding on behalf of the complainant by its general manager and else than the estimate of the city's expert of 27,500,000, and is a just and reasonable estimate.

As to the probable operating expense for the year 1922, which the complainant alleges will be not less than $1,134,-479.57 and which the commission estimated at $1,111,728.84, the defendants allege, upon information and belief, that there is included in complainant's estimate the sum of approximately $7,000.00 for federal income tax and depreciation at approximately $135,000.00, whereas the defendants allege that the federal income tax should not be included in operating expenses and that depreciation to be included therein should not exceed $115,000.00, and that other items are included which should be excluded or reduced.

[fol. 49] As to the allegation that the actual operating income for the first five months of the year 1922 was $65,-411.46, the defendants allege, upon information and belief, that in computing its operating income for said period, the complainant has included in operating expenses certain items which should be eliminated, and the elimination of which will greatly increase the true operating income.

The defendants further allege that the rate of fare allowed by the commission will yield an operating income of approximately $345,000.00, which is 7½ per cent on the fair value as found by the commission.

VIII

The defendants admit the allegations of the thirteenth paragraph thereof.

IX

As to the fourteenth paragraph thereof, the defendants admit the allegation as to the rate of return found by commission and deny all of the other allegations contained therein.

X

The defendants deny the allegations of the fifteenth paragraph thereof.

XI

As to the sixteenth paragraph the defendants admit that the management of the complainant has been efficient and economical and deny all of the other allegations contained therein; and the defendants allege that a fare of seven cents with four tickets for twenty-five cents, will enable

the complainant to pay expenses, including taxes and depreciation, and will produce a return on the fair value of said profits of $670,274.00 or 14.6 per cent, and would, after paying the interest and discount on its bonds, leave [fol. 50] an amount available for dividends on its stock of $539,900.00, which is equivalent to 45 per cent.

XII

As to the seventeenth paragraph thereof, the defendants deny the allegations thereof and in that respect allege that they have made no threats or plans as to the enforcement of said order.

XIII

The defendants deny the allegations of the eighteenth and nineteenth paragraphs thereof.

XIV

As to the allegations of the first sub-paragraph of the twentieth paragraph thereof the defendants deny the same, and, in respect thereto, allege that the defendants are not now preparing to bring any proceedings against the complainant to compel obedience to said order; that the city of Duluth has appealed from said order to the district court of St. Louis County, Minnesota, pursuant to the provisions of chapter 278, Laws of Minnesota, 1921; that the said city of Duluth is a proper party to test the reasonableness and lawfulness of said order; and that said appeal is the orderly method provided by said chapter 278 for said test; that the complainant is a necessary party to the trial of said appeal and that all of its rights can be protected therein; that it is possible that in the future a situation might arise, in connection with the enforcement of said order, which would require the defendants to take steps to enforce the same, in which event such proceedings would be taken as are authorized by the state law; but that there [fol. 51] is no present necessity for the same, nor do the defendants anticipate that such necessity will arise.

As to the second and third sub-paragraphs of the twentieth paragraph, thereof, the defendants state that they

have no knowledge or belief as to the allegations contained therein.

The defendants further allege that the bill of complaint does not state any matters of equity entitling the complainant to the relief prayed for, nor are the facts as stated in said bill sufficient to entitle the plaintiff to any relief against the defendants.

Wherefore, The defendants having fully answered all of the matters in the bill of complaint herein material to be answered according to their best knowledge and belief, hereby pray this honorable court to enter its judgment dismissing the bill of complaint, and for their reasonable costs and charges and for such other relief in the premises as may seem meet and in accordance with equity.

Clifford L. Hilton, Attorney General; Henry C. Flannery, Assistant Attorney General, Solicitors for Defendants.

[fols. 52-54] *Duly sworn to by Ivan Bowen. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 55] In United States District Court

[Title omitted]

Answer of Defendant the City of Duluth—Filed September 23, 1922

Now comes the defendant, the City of Duluth, to the above entitled action and for its answer to the bill of complaint herein:

I

The defendant admits the allegations of the first six paragraphs of the complainant's bill.

II

The defendant admits the allegations of the seventh paragraph thereof;

The defendant alleges that in the first instance the complainant obtained from the Railroad & Warehouse Commis-

sion of Minnesota, with a dissenting opinion of one of the commissioners, an order establishing a so-called emergency or temporary rate of fare pending the full valuation of its property according to statute, but that pursuant to the provisions of said Chapter 278, General Laws of Minnesota for 1921, and the other relevant statutes in relation to an appeal, the City of Duluth duly appealed from said order allowing [fol. 56] an emergency or temporary rate of fare to the District Court of St. Louis County, Minnesota, and applied for an order staying and preventing the collection of any rate of fare above that which had previously prevailed for about forty (40) years, viz., 5 cents, until full hearing of the said appeal; and defendant alleges that said application for stay order or supersedeas was heard by three of the Judges of the District Court of St. Louis County, Minnesota, and the stay order was granted as applied for and has never been set aside by said Court. That a full and true copy of said order dated September 10, 1921 and memorandum dated September 13, 1921, is hereto attached and made a part of this answer as Exhibit A. And defendant further alleges that the complainant never saw fit to bring the matter of said appeal on for a hearing before the said District Court of St. Louis County after such stay order had been granted by it, but in effect abandoned all efforts to put into effect in said Court said so-called emergency or temporary increased rate of fare above 5 cents.

III

The defendant admits the allegations of the eighth paragraph of the said complaint.

It also alleges that pursuant to the provisions of Section 9 of said Chapter 278, Laws of Minnesota 1921, it was the express statutory duty of the City Council of the City of Duluth for protection of its citizens to employ necessary experts to make a separate appraisal of the property of the complainant, to investigate its books, accounts and records and to secure full information as to operating conditions and expenses and revenues as a base for presentation to the said Commission, and as an aid to it in its determination therein as to the value of complainant's property.

IV

The defendant admits the allegations of the ninth paragraph of the said complainant.

It further alleges that in said proceeding before said [fol. 57] Commission lengthy investigations were had by it and numerous hearings were held by it at which numerous expert witnesses appeared and testified both on behalf of the complainant and on behalf of the City of Duluth; and that there was considerable difference of opinion and conflict between the witnesses for the complainant and those of the City of Duluth as to items which should be included as elements in the rate base and in determination of the fair value of the complainant's property and as to the proper operating expenses of the complainant and as to its proper and probable revenues and on numerous other points not herein specifically mentioned and the defendant alleges that after more than a year's examination and consideration the said Commission made its order bearing date July 13, 1922, after weighing all the testimony adduced and hearing all of the various contentions of the respective parties.

V

The defendant admits that the said Commission found the total value of the complainant's property as of December 31, 1921, to be $4,599,978.22 and summarized as stated in the complaint.

The defendant denies the allegation of the complainant in the sense alleged therein, that is to say, as complaining that the said valuation is too low and that it ought to be higher.

On the contrary, the defendant hereby alleges that the said valuation made by the said Commission is excessive; and that the full and fair value of the complainant's street railway property in the City of Duluth as an operating system was not, and is not, and should not have been found and ought not to be found as of any greater value than $3,800,000.00. The facts in respect to the elements of the said valuation being hereinafter more fully set forth in detail, reference to which is hereby made.

Further answering sub-paragraphs of the complaint lettered (a) to (h):

[fol. 58] As to sub-paragraph (a) defendant admits that the said commission fixed the depreciated value of the property mentioned at the sum stated in said complaint; and admits that there was some testimony in the said proceeding relating to a rate base value, based solely upon the average prices prevailing during a ten year period from 1912 to 1921 inclusive; but the defendant denies that the amount so found by the use of such average is a proper or sole basis for determination of the fair value of the property; and the defendant alleges that there was testimony before the said Commission as to the value of the property not only upon such ten year average basis but upon the base of the historical cost, also upon a base figured upon the prices prevailing in 1915, and also based upon the reproduction cost new as of date July 1, 1921, and also testimony as to the book cost, and the book value, and the assessed valuation of the property as of May 1, 1921, as fixed by the local assessor of the City of Duluth and the State Tax Commission of the State of Minnesota whose duty it was to fix the true and fair cash value of the said property; and there was also in evidence before the Commission a former valuation made of the said property with full allowances made for all additions to date of hearing; and also the sworn statement of the secretary and treasurer of the Street Railway Company in evidence claiming a valaution of the said property, which with all proper additions since would show a value not to exceed the sum of $2,694,800.15 as of January 1, 1921. And the defendant alleges that the finding of the Commission as to fair value was thus based upon the consideration of all of such testimony and not upon any single element; and defendant denies the allegation that the fair value is not less than the sum stated in the complaint and as above stated, avers that it is no greater than the sum of $3,800,000.00.

[fol. 59] VI

The defendant admits that the computations contained in the allegations of said sub-paragraph (b) by which the complainant arrives at the sum stated as the amount of

general overheads, is a correct statement of the result which would be arrived at by the application of the percentages used by the Commission to the base value, if and providing that ten *year average costs are alone used; but alleges that* such cannot be the sole basis; and avers that to so use them is error; and that since the base costs to which such percentages are applied by the complainant is error necessarily the resulting depreciated value of overheads so claimed in sub-paragraph (b) is likewise erroneous.

The defendant admits the allegations of sub-paragraph (c) of the said complaint as to the value placed by the Commission on the power contract; but denies the other allegations of said subparagraph (c); and further alleges that it claims error against itself in the said order of the Commission in making any allowance for value of the said power contract; and that the order of said Commission was erroneous and excessive in its stated valuation by reason of such fact.

The defendant admits the allegation of sub-paragraph (d); but alleges that the City of Duluth claims that the true value which should have been found by the Commission and stated as said element of the rate base in its said order ought not to have exceeded the sum of $118,094.00; and that its order was excessive, therefore, in the sum of at least $31,906.00.

The defendant admits the allegation of the complaint in said sub-paragraph (e); and defendant makes no complaint as to the said item.

The defendant admits the allegation of said sub-paragraph (f) that the Commission found that the complainant [fol. 60] should be allowed $30,000.00 as working capital.

The defendant alleges that such allowance for working capital is excessive by at least the sum of $5,000.00 in view of the allowance by the Commission for materials and supplies in the sum of $105,000.00; and defendant avers that in complainant's business its revenues are received for services in advance; and that under the order of the Commission and of the Court it will always have on hand a considerable sum derived from sale of tickets in advance of their use; and alleges that the amount of $25,000.00 for working capital is ample and sufficient for all of the complainant's needs.

Defendant denies the other allegations of the complaint herein contained in said sub-paragraph (f).

The defendant denies the allegations of the sub-paragraphs (g) and (h) of said complaint.

VII

The defendant admits that the sums stated in sub-paragraphs lettered (a) to (i) and the sub-paragraph introductory thereto of the tenth paragraph of the complaint are what they purport to be; but avers that such a combination of items is wholly unwarranted as furnishing any reliable or correct conclusion as to the fair value of the complainant's property for rate making purposes, for reasons hereinabove stated in part, and for other reasons which might be stated; and specifically as to sub-paragraph (g) defendant alleges that the said item "cost of financing" should not under any circumstances be included in the rate base or valuation, but should only be considered on the question of proper rate of return to be allowed to complainant on such valuation.

VIII

The defendant admits what the complaint contains as stated in the introductory paragraph and the third set of [fol. 61] sub-paragraphs lettered (a) to (i) of said tenth paragraph; but defendant alleges that such amounts are each and all excessive, above the fair value thereof; and that the said total is excessive and unwarranted to the extent that it exceeds the valuation claimed by the city of Duluth herein, to-wit, the sum of $3,800,000.00; and are, in the items, improper, by reason of the facts hereinabove stated in detail as to special items and for other reasons, some of which will be hereinafter stated below.

The defendant especially denies the allegation of the last sentence of said paragraph ten of the complaint, and alleges that the fair value of the complainant's said property as an operating system is not greater than the sum of $3,800,000.00.

IX

The defendant denies the allegations of paragraph eleven of the plaintiff's complaint alleging that the rate of fare established by the said Commission's order will not yield

a reasonable return on the fair value of complainant's street railway property in the City of Duluth as an operating system; and alleges that such rate of fare so established will yield an amount in excess of a reasonable return on the fair value of complainant's street railway property in the City of Dul as an operating system to the extent that such order allows a rate of fare in excess of a 5 cent cash fare to be charged each of its revenue passengers.

Defendant denies the allegations of the last sentence of said paragraph eleven of the complaint.

X

The defendant admits the allegation that the said Commission used the number of 27,030,000 as estimated revenue passengers during the year 1922 as a basis for its estimate of revenues. It admits the allegation of the complainant contained in the second sentence of said paragraph twelve.

Defendant admits that the said Commission found that [fol. 62] on the valuation as established by it, it would be necessary for the complainant to secure an operating income of $345,000.00 in order that it might earn a rate of return of 7½% on its said valuation, and that it found that to do this it would be necessary to incerase the rate of fare so as to produce an additional $95,000.00.

The defendant denies each and every other allegation contained in said paragraph twelve of the complaint.

XI

The defendant admits the facts stated in paragraph thirteen of the plaintiff's complaint; but avers that the annual depreciation allowed by the Commission was in itself excessive; and avers that it should not exceed the annual sum of $100,000.00 instead of $115,000.00 as allowed by the Commission in its estimate of operating expenses.

In respect to Federal Income Tax, the defendant alleges that the same is immaterial in the controversy as the amount involved does not exceed approximately the sum of $7,000.00 annual tax.

XII

Defendant admits that the Commission by its order found that complainant was entitled to a rate of return of

7½% on the value of its property; and denies all other allegations of said paragraph fourteen of the complaint.

Defendant avers that such rate of return is excessive; and ought not fairly, in view of general and local conditions affecting the complainant in the City of Duluth, Minnesota, to exceed a rate of 6% per annum; and alleges that such rate of return on the fair value of its property within the City of Duluth, viz. 6%, will be sufficient to give a just, fair and reasonable return on the fair value of complainant's property in such city as an operating system; and will be sufficient to induce the investment of capital in the business of said complainant and its continuation therein; and that any return in excess of said sum on the fair valu-[fol. 63] ation of complainant's property would be unjust and unreasonable, and unlawful, so far as it affects the car riders and the general public using said street railway system; and that such 6% rate of return will not be confiscatory of the property of the complainant, nor deprive it of any of its rights under the Constitution of the State of Minnesota or the United States either under the 14th Amendment to the Constitution of the United States, or otherwise.

XIII

The defendant denies the allegations of paragraphs 15, 16, 17, 18, 19 and 20 of the complaint.

XIV

The defendant especially avers that the allowance of $500,000.00 as going concern value of the property of the complainant is excessive and that it should not fairly exceed the sum of $200,000.

XV

The defendant alleges that in estimating the probable number of revenue passengers for 1922, the said Commission applied to the number of passengers carried for the first four months of 1922 a factor extending or equating the same to a yearly basis which factor was based not upon the experience for 1921 alone, but upon the experience of the complainant over a period of years and that the estimate so made by the Commission of 27,030,000 is less than

the estimate of 27,200,000 as testified to in said proceeding on behalf of the complainant by its general manager and is less than the estimate of the expert of the City of Duluth, put at 27,500,000; and the defendant alleges that the said estimate of the said Commission is too low and is lower than the number of revenue passengers existing for any year subsequent to the year 1918; that the number of revenue passengers for 1921 was more than 27,246,000; that the number of revenue passengers for 1920 was more than 29,500,000 and defendant alleges that the year 1921 was a year of general business depression in the City of [fol. 64] Duluth reaching the proportions of an industrial slump; that many of its large manufacturing enterprises were either wholly or in part shut down throwing its employees out of employment in whole or in part and the City avers that beginning in April 1922, a change in such conditions began and has continued to the present time when practically all industries and businesses are being operated on a normal basis; that there has been a great deal less of unemployment due principally to the resumption of activities on the part of some of the larger industries such as the Minnesota Steel Company and the Zenith Furnace Company and owing to a great number of large public improvements involving the employment of labor and the expenditure of large sums of money, and owing to the resumption of other forms of business too numerous to mention; and the defendant avers that on account of such change of conditions there is every reason rationally to hope and expect that the revenues of the complainant will increase during a scheduled year succeeding the making of the order of the said Commission of July 13, 1922, thus making it a more prosperous year for complainant than that of 1921.

And defendant avers that the result of a continuation of a straight five cent fare for the year 1922, or scheduled year would produce as net earnings a sum not less than $254,107.26 equivalent to a rate of return of 6 6/8ths% on the city's claimed valuation of $3,800,000.00; and that it would be in excess of 6% on a valuation of $4,000,000.00 and would be the equivalent of 5.5% on the valuation of $4,599,978.22 as found by the Commission in its said order; and defendant alleges that the effect of a year's operation upon the new and increased rate of fare established by the

Commission by its said order for 1922, or a scheduled year, would produce a net revenue above all legitimate operating expenses of $345,000.00; whereas if regard were had to the claim of the City of Duluth of valuation of $3,800,000. the said new and increased rate established by the Commission would produce on said valuation of $3,800,000.00 a return equivalent to 9%; and said new rate so in-
[fol. 65] creased by said order would produce a net return of 8.06% on a valuation of $4,000,000.00; and as found by the Commission would return 7½% upon its stated valuation.

The defendant alleges upon information and belief that in computing its operating income the complainant has included in operating expenses certain items which should be eliminated and the elimination of which will greatly increase the true operating income of complainant.

XVI

The defendant denies the allegation of the complaint that the probable operating expenses for the year 1922 will not be less than in 1921, owing to anumber of important factors, and belief that there is included in the complainant's said estimate the sum of approximately $7,000.00 for Federal Income Tax, and an annual depreciation allowance of approximately $135,000.00, and also other items are included which should be excluded or reduced. Whereas the defendant avers that the said Federal Income Tax should not be included in operating expenses and avers that depreciation, annual, should not exceed the sum of $100,000.00 and that many other items are included in said estimated expense which should be excluded or reduced as will be shown by testimony.

And defendant further avers that the operating expenses of the complainant for the year 1922, or for a scheduled year subsequent to the said order of said Commission will beless than in 1921, owing to a number of important factors, to-wit: reduced labor costs by change of schedule made on the 16th day of January, 1922, in the sum of at least $59,000.00 per year; in a reduction of the amount allowed by the Commission for depreciation equal to at least $19,000.00 less than in 1921 and third in the reduced cost of materials going into the use of the complainant equal to at

least 8.3% less than as compared with similar cost in 1921; and the defendant avers that the annual operating costs for [fol. 66] the said Company will be at least $200,000.00 less than in the year 1920.

XVII

The defendant alleges that a fare of seven cents with four tickets for 25¢ as claimed by the complainant in its bill will enable the complainant to pay expenses including taxes and depreciation and will produce a net return of $684,607.26 or an equivalent of more than 14% on the valuation found by the said Commission, and more than 18% on the valuation of $3,800,000, claimed as the proper valuation by the defendant.

The defendant further alleges that the bill of complaint does not state any matters of equity entitling the complainant to the relief prayed for; nor are the facts as prayed for in said bill sufficient to entitle plaintiff to any relief against the defendant;

Wherefore, The defendant having fully answered all of the matters in the bill of complaint herein material to be answered according to its best knowledge and belief hereby prays this Honorable Court to enter its judgment and decree dismissing the bill of complaint and for its reasonable costs and charges, and for such other relief in the premises as may seem meet and in accordance with equity.

John B. Richards, Solicitor for Defendant City of Duluth.

Duly sworn to by John B. Richards. Jurat omitted in printing.

[fol. 67] Exhibit A to Answer of Defendant City of Duluth

State of Minnesota,
County of St. Louis:

In District Court, 11th Judicial District

In the Matter of the Application of The Duluth Street Railway Company to Have Fixed and Established Increased Rates of Fare to be Charged by Such Street Railway Company for Carrying of Passengers Within the City of Duluth, Pursuant to Chapter 278, General Laws of Minnesota, for the Year 1921

City of Duluth, Appellant,

vs.

Duluth Street Railway Company, Respondent

The above entitled matter came on for hearing before the undersigned on the motion of the Appellant, City of Duluth, for an order staying and superseding the order of the Railroad & Warehouse Commission in the above entitled matter made and entered by said Railroad & Warehouse Commission of the State of Minnesota on the 29th day of August, 1921, in the office of said Railroad & Warehouse Commission. J. B. Richards, Esq. and B. W. Forbes, Esq. appeared as attorneys for the City of Duluth and Oscar Mitchell, Esq. and H. A. Carmichael, Esq. of the firm of Washburn, Bailey & Mitchell as attorneys for the Respondent Duluth Street Railway Company. After giving due consideration to the records and files in said matter and the arguments of counsel, it is—

Ordered: That said motion be and the same hereby is granted and that from the hour of twelve o'clock midnight of September 10, 1921, said order of said Railroad & Warehouse Commission authorizing the Duluth Street Railway Company to charge a six cent rate of fare upon the cars and lines of the Duluth Street Railway Company operated in the City of Duluth, Minnesota, be stayed and [fol. 68] superseded until the further order of the court; and that from said hour and date said Duluth Street Rail-

way Company, its officers, agents, servants and employes refrain from demanding, collecting or receiving any rate of fare for passenger service upon any of its street railway lines within the City of Duluth in excess of the rate therefor in force prior to the making of said order of August 29, 1921.

Dated September 10, 1921.

By the Court:

Wm. A. Cant, H. A. Dancer, Bert Fesler, Judges of the District Court.

A memorandum expressing the views of the court on this matter will be filed later.

[fol. 69] EXHIBIT A

STATE OF MINNESOTA,
County of St. Louis:

In District Court, Eleventh Judicial District

In the Matter of the Application of THE DULUTH STREET RAILWAY COMPANY to Have Fixed and Established Increased Rates of Fare to be Charged by Such Street Railway Company for Carrying of Passengers Within the City of Duluth, Pursuant to Chapter 278, General Laws of Minnesota, for the Year 1921

CITY OF DULUTH, Appellant,

vs.

DULUTH STREET RAILWAY COMPANY, Respondent

Memorandum to be Attached to the Order Heretofore Filed Herein Staying the Operation of the Emergency Fare Order of the Railroad and Warehouse Commission.

Under the provisions of Chapter 278, General Laws of 1921, the Duluth Street Railway Company applied to the State Railroad and Warehouse Commission for an order establishing the rate of fare to be charged upon its lines

in Duluth. Upon the filing of that application it became the duty of the Commission to proceed with diligence to examine and appraise the street railway property, to hear all competent evidence submitted in behalf of the street railway company or the city, to thereby determine the fair value of the street railway property, and thereupon to establish rates of fare which shall yield to the street railway company a rasonable return on such fair value of its property.

The work imposed upon the Commission by the filing of any such application necessarily requires some consider- [fol. 70] able time. In recognition of that fact, the statute authorizes the Commission, in case of emergency, to establish a temporary rate of fare pending its final decision. In this case, after a hearing and upon consideration of some evidence including the book value only of the street railway property, the Commission granted an emergency or temporary rate of six cents. The city appealed from the order establishing such rate and that appeal is now pending in this court.

It is further provided by statute that such appeal shall not suspend the operation of the order fixing a temporary rate unless the court shall so direct. The matter now comes before the court upon application of the city for an order so directing the suspension of the six-cent order until the determination of the pending appeal. We are not called upon at this time to determine whether the Street Railway Company is entitled to charge an increased fare, nor are we now required to determine on the merits whether an emergency rate is justified. We determine neither of these matters. We are presented with the single ultimate question of whether the emergency rate shall be suspended until the determination of the appeal from the order establishing it. We know of no hard and fast rules by which we must determine that question. We state some of the consideration that have influenced us in arriving at our decision.

Unless the evidence before the Commission established the existence of an emergency, the Commission was in error in fixing an emergency rate. We do not have that evidence before us, but we do have the findings of fact made from such evidence and the conclusions of the Commission

based thereon. In examining and interpreting these we [fol. 71] give to the Street Railway Company, for the purposes of this hearing, the benefit of probably the most favorable definition of "emergency" that can be applied in this case, to-wit: "pressing necessity." We also apply the rule that detailed findings control general conclusions if inconsistent with them. From such examination we are of the opinion that the findings of the Commission do not sustain its conclusion that such emergency exists.

In view of the fact that this matter will come before us again upon the appeal, when we may hear evidence and go into the subject at much greater length, we do not think it necessary at this time to discuss in detail the reasons for our conclusions. One or two outstanding features only will be briefly mentioned.

The Commission finds that the Street Railway Company will be required in the near future to expend large sums of money in betterments, replacements and improved service; and it holds that it is not important whether such requirements come in 1921, 1922 or 1923; that in order to meet them the company must make such a favorable showing of earnings as to attract investors in its long-time securities. Assuming this finding to be true, we cannot follow the Commission to its conclusion that the apparent need of funds in 1922 or 1923 creates a present "pressing necessity" sufficient to justify an emergency rate. Again, the Commission is unable to make a finding as to the fair value of the street railway property; yet it holds that the company is not making a reasonable return on any possible valuation. Assuming this finding to be true, that fact does not create an emergency. In addition to the findings of the Commission, we have certain affidavits submitted in [fol. 72] behalf of the city, and from these affidavits in connection with the findings of the Commission, as well as from the findings of the Commission alone, it appears that certain heavy expenditures which the Street Railway Company expected to make during the year 1921 will not necessarily be made this year.

From the findings of the Commission, we are of the opinion that an emergency sufficient to justify an increased temporary fare was not established; and from all the files and records before us we are of the opinion that the exist-

ence of such emergency is too doubtful to justify us in permitting the company to collect the excess fare pending the hearing on the appeal.

Wm. A. Cant, H. A. Dancer, Bert Fesler, Judges.

You are hereby notified by this copy that the original Memorandum was filed in this office on Sept. 13, 1921.

J. P. Johnson, Clerk, by B. G. Rilling, Deputy.

[File endorsement omitted.]

[fol. 73] 2585. Copy

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT AND NOTICE OF HEARING—Filed August 6, 1923

Come now the Railroad and Warehouse Commission of the State of Minnesota, O. P. B. Jacobson, Fred W. Putnam, Ivan Bowen, and Clifford L. Hilton, defendants above named, and move the court to dismiss the bill of complaint of the Duluth Street Railway Company, plaintiff, in the above entitled action, upon the ground and for the reason that said bill of complaint does not state a cause of action cognizable in this court.

And, in the alternative, said defendants move the court for judgment of dismissal or in favor of said defendants on the pleadings upon the grounds following, to-wit:

That it conclusively appears from the pleadings that all the acts and things done or threatened by these defendants as alleged in the complaint were done and are threatened, if at all, under and pursuant to chapter 278 Session Laws of Minnesota 1921; and that it further conclusively appears that said plaintiff, long prior to the doing or threatening of any of said acts or things, had voluntarily consented, agreed and contracted for a valuable consideration (i. e. the grant-[fol. 74] ing of an indeterminate permit to said plaintiff in lieu of its franchise) that all said acts or things done or threatened as alleged in the complaint might and should be

done by these defendants, and that said plaintiff would submit to, abide and be bound by the rates of fare and charges fixed and established by the defendant Railroad and Warehouse Commission of the State of Minnesota subject only to change or modification by the proper district court of said state of Minnesota and by its supreme court as provided in said chapter 278 Session Laws of Minnesota 1921, and particularly sections 5, 8, 9, 10 and 14 thereof.

Clifford L. Hilton, Attorney General of the State of Minnesota; Montreville J. Brown, Assistant Attorney General of the State of Minnesota; Ernest C. Carman, Assistant Attorney General of the State of Minnesota, Attorneys for Defendants, 102 State Capitol, St. Paul, Minnesota.

Notice of Hearing on Motion

To Washburn, Bailey & Mitchell, attorneys for the Duluth Street Railway Company, plaintiff in the above-entitled action, and to John B. Richards, attorney for the city of Duluth, intervenor and defendant in the above-entitled action:

You will please take notice that the above and foregoing motion of the Railroad and Warehouse Commission of the State of Minnesota, O. P. B. Jacobson, Fred W. Putnam, Ivan Bowen, and Clifford L. Hilton, defendants in the above entitled action, is set down and will be brought on for hear- [fol. 75] ing before the above named Court at the United States District Court Rooms in the United States Postoffice (Federal) Building in the City of St. Paul, County of Ramsey and State of Minnesota, on Monday the 6th day of August 1923 at 10 o'clock A. M. or as soon thereafter as may suit the convenience of the court.

Dated at St. Paul, Minnesota, this 27th day of July, 1923.

Clifford L. Hilton, Attorney General of the State of Minnesota; Montreville J. Brown, Assistant Attorney General of the State of Minnesota; Ernest C. Carman, Assistant Attorney General of the State of Minnesota.

[File endorsement omitted.]

[fol. 76] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF CITY OF DULUTH TO DISMISS BILL OF COMPLAINT AND NOTICE OF HEARING—Filed August 6, 1923

Comes now the City of Duluth Intervenor in the above-entitled action and moves the Court to dismiss the Bill of Complaint of the Duluth Street Railway Company plaintiff in the above entitled action, upon the ground and for the reason that said Bill of Complaint does not state a cause of action cognizable in this court and in the alternative, said defendant and intervenor moves said Court for judgment of dismissal in favor of the said defendant and intervenor on the pleadings herein upon the grounds following, to-wit:

That it clearly and conclusively appears from the pleadings that all the acts and things done or threatened by the defendant Railroad & Warehouse Commission and the intervenor as alleged in the complaint were done, and are threatened if at all, under and pursuant to the provisions of Chapter 278 Session Laws of Minnesota for the year 1921; and that it further clearly and conclusively appears that said plaintiff long prior to the doing or threatening of said acts or things had voluntarily consented, agreed and contracted for a valuable consideration (i. e. the granting of an indeterminate permit to said plaintiff in lieu of its [fol. 77] franchise) that all said acts or things done or threatened in the complaint might and should be done by said defendants and that said plaintiff would submit to, abide and be bound by the rates of fares and charges fixed and established by the defendant Railroad & Warehouse Commission of the State of Minnesota, subject only to change or modification by the proper District Court of the said State of Minnesota and by its Supreme Court as provided in said Chapter 278, Session Laws of Minnesota 1921, and particularly Sections 5, 8, 9, 10 and 14 thereof.

Dated Duluth, Minnesota, August 2, A. D. 1923.

John B. Richards, City Attorney of the City of Duluth, Solicitor for Intervenor.

[fol. 78] Notice of Hearing on Motion

To Washburn, Bailey & Mitchell, attorneys for the Duluth Street Railway Company, plaintiff in the above-entitled action, and to Clifford L. Hilton, Attorney General of the State of Minnesota, attorney for the Railroad & Warehouse Commission of the State of Minnesota, defendant in the above-entitled action:

You will please take notice that the above and foregoing motion of the City of Duluth, intervenor and defendant, is set down and will be brought on for hearing before the above named Court at the United States District Court Rooms in the United States Post Office (Federal) Building in the City of St. Paul, County of Ramsey and State of Minnesota, on Tuesday the 7th day of August, 1923, at 10 o'clock A. M., or as soon thereafter as may suit the convenience of the Court.

Dated at Duluth, Minnesota, this 2nd day of August, 1923.

John B. Richards, City Attorney of the City of Duluth, Solicitor for Intervenor.

[File endorsement omitted.]

[fol. 79] In United States District Court

[Title omitted]

Order Overruling Motion to Dismiss—Filed August 13, 1923

The above entitled matter came on for hearing before the Court, in the court rooms in the City of St. Paul, on August 6th, 1923, upon motion of the defendant and intervenor to dismiss the complaint herein on the grounds stated in said motions, Messrs. Washburn, Bailey & Mitchell, by Oscar Mitchell and H. A. Carmichael, appearing as attorneys for plaintiff, and Montreville J. Brown, Assistant Attorney General, appearing for the defendants, and John B. Richards, Esquire, appearing for the intervenor, the Court having heard the arguments of counsel and being advised in the premises,

It is ordered, that said motions be and the same hereby are in all respects denied.

It was suggested in open court that Fred W. Putnam is no longer a member of the Railroad and Warehouse Commission of the State of Minnesota, and Frank W. Matson has been appointed a Commissioner of the Railroad and Warehouse Commission of the State of Minnesota, and that he should be substituted as one of the defendants in place of Fred W. Putnam, and it appearing to the Court that [fols. 80-83] such substitution should be made,

It is ordered, that Frank W. Matson be substituted as one of the defendants in the place of Fred W. Putnam.

Dated August 9, 1923.

Wilbur F. Booth, Judge.

[File endorsement omitted.]

[fol. 84] In United States District Court

[Title omitted]

Statement of Evidence—Filed December 10, 1923

Proceedings before Special Master

[fol. 85] Appearances of counsel omitted in printing.

Colloquy Between Master and Counsel

The Master: The City of Duluth has intervened, I understand?

Mr. Mitchell: Yes, an order was made allowing the City to intervene and file an answer. Later, an order was also made, substituting Mr. Frank W. Mattson for Mr. Putnam, as one of the defendants. Your Honor is familiar with Chapter 278 Session Laws of Minnesota for 1921, under which the Railroad and Warehouse Commission is given authority to regulate rates and fix the rates for street railways. The Duluth Street Railway Company, after the passage of that law, filed its acceptance and brought itself under the law, and then applied to the Commission for determination as to value, rate of return, and rates of fare.

The Commission took jurisdiction of the case, and, following the suggestion of the Commission, the City employed Mr. Byron T. Gifford, Consulting Engineer, to make the valuation which the law contemplates will be made by the representative of the City. The Company employed [fol. 86] Mr. A. L. Drum for that purpose. The two engineers, following—not an order, perhaps, but a suggestion, at least, of the Commission, got together and agreed upon a great many things. That is, they agreed, first, on the physical inventory of the property as it existed at the date which was fixed, July 1, 1921. They agreed on that inventory, so that there is no controversy as to what the physical property is. They then took four different bases, and agreed upon the unit cost for each of these bases as to the physical property except the land. Those bases were: Pre-war cost, being prices current in 1915. Ten-year average cost, being the average prices for the years 1912 to 1921. The present-day cost, being prices current for the month of June, 1921. And, estimated original cost, being prices current at the date of installation. And then they did a little more than that, as their reports show. They agreed upon when the different parts of the plant were installed. So that, as to the physical property, except the land, their reports agree upon those things that I have mentioned.

Each of those engineers made his report in two volumes, one being a small volume with the summaries, merely giving the results; and the other being a larger volume giving the detail which is summarized in Volume 1. Both followed that method. They did not agree upon what we call the intangibles. They did not agree upon the extent of the depreciation, although there was not really a great difference in that. Then, before the Commission there were introduced [fol. 87] these reports of the engineers, and each of the engineers went on the stand and gave his testimony, as was deemed wise by counsel, in explanation and in justification of his report. Those original, signed exhibits, I assume, are in the files of the Commission. By a little moral suation with a representative of the Commission, we secured typewritten copies which we have here. I see one of these is signed by Mr. Drum, and one of them is not. These we will hand to your Honor.

Now, in addition to this testimony of the engineers and these reports, the Complainant will offer evidence by bankers and others which we think will help the Master to determine what will be a fair rate of return upon the rate base made by the Company, and then we will offer evidence, largely prepared by the management of the Company, which we think will give the necessary assistance in determining what the rate of fare should be.

Now, we are prepared, on all of this matter, to go ahead completely this morning, except insofar as Mr. Drum's personal presence is required. Our suggestion is that we go ahead with the understanding that we get Mr. Drum here at the earliest possible date, and that the oral evidence of both Mr. Drum and Mr. Gifford be deferred until that time. We are prepared to offer in evidence this report, subject to later qualification by Mr. Drum, and then go ahead without other evidence as we may be able to do. We would like, if possible, to communicate with the witnesses on the rate of return, and our thought has been that probably we could use them tomorrow.

The Master: Will there be any addition made to the [fol. 88] inventory?

Mr. Richards: Not today.

The Master: Or will that be agreed upon?

Mr. Richards: I think it will, eventually.

The Master: Have you agreed upon a date where the cut-off is to take place?

Mr. Carmichael: Yes. June 30th of this year.

Mr. Mitchell: This second volume is not signed by Mr. Drum. May it be understood that that will be signed by him?

Mr. Richards: Yes.

Mr. Mitchell: I now formally offer in evidence Volumes One and Two of the reports of Mr. A. L. Drum. Volume One is Complainant's Exhibit 1, and Volume Two is Complainant's Exhibit 2,—the report of the value of the property of the Duluth Street Railway Company as of July 1, 1921, the Duluth division, by A. L. Drum.

Mr. Carman: The defendants, Railway and Warehouse Commission of the State of Minnesota, O. P. B. Jacobson, Frank W. Mattson, Ivan Bowen, and Clifford L. Hilton, object to the introduction of any evidence, or the taking of

any testimony by or in behalf of the plaintiff, upon the ground and for the reason that the Bill of Complaint of the Plaintiff, the Duluth Street Railway Company, does not state a cause of action, nor allege facts constituting a cause of action against these objecting defendants in this court.

Mr. Richards: The City of Duluth, Intervenor, joins in that objection.

[fol. 89] The Master: I think the general rule is that the Master has no power to exclude evidence, as that is a matter for the Court, but I will overrule the objection as a matter of form.

Mr. Carman: The defendants except to the ruling.

Mr. Richards: The City of Duluth, Intervenor, also excepts to the ruling.

Mr. Carman: The same defendants move that the complaint of the plaintiff be dismissed, on the same grounds and for the same reasons as just set forth in their objection to the taking of evidence by or on behalf of the plaintiff.

Mr. Richards: The same motion.

The Master: That is clearly beyond the power of the Master, but I will deny it.

Exception by the defendants and the Intervenor.

Mr. Carman: Defendant Railway and Warehouse Commission, of the State of Minnesota, O. P. B. Jacobson, Frank W. Mattson, Ivan Bowen and Clifford L. Hilton, object to the introduction of any evidence, or taking of any testimony against them on the ground and for the reason that the District Court of the United States for the District of Minnesota, Third Division, in which this action is brought, has no jurisdiction over these objecting defendants.

Mr. Richards: The City of Duluth, Intervenor, makes the same objection.

The objection was overruled by the Master, and exception was taken to the ruling by the defendants and the Intervenor.

Mr. Carman: The same defendants make the same ob-
[fol. 90] jection last stated upon the further ground and for the further reason that said District Court of the United States, District of Minnesota, Third Division, has no jurisdiction over the matters alleged in plaintiff's cause of ac-

tion in the Bill of Complaint of said plaintiff, the said Street Railway Company.

Mr. Richards: The City of Duluth, Intervenor, makes the same objection.

The Master: Objection overruled. Mr. Carman, what is the distinction in the last two motions,—something you wanted me to note?

Mr. Carman: I want to get your ruling, specifically, without stating my objections in such form as to make it necessary for a ruling upon the objection to touch more than one point. One of these objections is to go to jurisdiction of the person, and the other as to the subject matter. That is the reason for making these objections so nearly alike.

The Master: Overruled.

Exception by the defendants and the City, Intervenor.

Mr. Carman: The defendants Railroad and Warehouse Commission of the State of Minnesota, O. P. B. Jacobson, Frank W. Mattson, Ivan Bowen, and Clifford L. Hilton, object to the introduction of any evidence, or the taking of any testimony by or on behalf of the plaintiff, or against these objecting defendants or any of them, upon the grounds and for the reasons, specifically, that it appears, both from the Bill of Complaint, and the admissions in their Answer to said Bill of Complaint, all the acts and things done or threatened by these defendants, as alleged in the complaint, [fol. 91] were done or threatened, if at all, under and pursuant to Chapter 278 Session Laws of Minnesota for the year 1921, known as the Brooks-Coleman Act, and under and pursuant to the voluntary consent, agreement, and contract of the plaintiff, made as provided in said Brooks-Coleman Act, prior to the doing or threatening or any of said acts or things, and made in consideration of the granting to said plaintiff of an indeterminate permit and monopolist privilege of operating its street railway lines for hire in and upon the streets of the City of Duluth, Minnesota, with all the privileges, immunities and benefits made available to said plaintiff by such Chapter 278 Session Laws of Minnesota for the year 1921, upon the conditions therein set forth and accepted by the plaintiff.

Mr. Richards: The City, Intervenor, joins in the objection, with special reference to the fact that the agreement

was that the laws gave the Railroad and Warehouse Commission initiative and exclusive control of rate making, by its order, subject to appeal to the State courts; that this condition is ignored and violated by the Street Railway Company, in seeking jurisdiction of the Federal courts, in ignoring and overlooking and failing to take any appeal to the State courts on the order of July 13, 1922.

The Master: Objections overruled.

Exception to the ruling was taken by the defendants and by the City, Intervenor.

Mr. Carman: Defendants Railroad and Warehouse Commission, O. P. B. Jacobson, Frank W. Mattson, Ivan Bowen, and Clifford L. Hilton, jointly and severally object to the [fol. 92] introduction of any evidence or the taking of any testimony concerning the valuation of the property of the plaintiff, or the rates to be charged by the plaintiff for its services to the public, on the grounds and for the reasons that the taking of such testimony and the introduction of such evidence is unnecessary, futile, and to no purpose, and that such proceedings impose an unnecessary, unwarranted, and inordinate expense upon these objecting defendants, because: First, under the interpretation placed by this Court upon Chapter 278 Session Laws of Minnesota for 1921 (known as the Brooks-Coleman Act), the Railroad and Warehouse Commission of the State of Minnesota is and always has been wholly without power to determine and establish any valuation of the property of the plaintiff, or any rates and charges to be made by plaintiff for its public services, whether confiscatory or otherwise. And, secondly, no valuation of the plaintiff's property, or examination of the rates to be charged by plaintiff for its public services, is relevant, material or necessary to enable this court to render judgment in this action. The sole and only source of power of the defendant Railroad and Warehouse Commission to make valuation of plaintiff's property, establish rates to be charged by plaintiff for its public services, or in any way take any action whatever with reference to plaintiffs, is said Chapter 278 Session Laws of Minnesota for 1921, known as the Brooks-Coleman Act; and under the provisions of said law such power is conferred on the defendant Railway Commission only upon the condition that a contract and agreement has been made

with plaintiff as in said law provided, and not otherwise, said contract and agreement to be consummated by the filing of a written acceptance and consent of the plaintiff in substantially the form in fact filed by the plaintiff, as [fol. 93] shown by Exhibit "A", attached to plaintiff's complaint. The Special Master, in refusing to sustain the objections just made by these defendants, and this Court, in overruling and denying the motion to dismiss or for judgment on the pleadings (argued on August 6, 1923), have held that such contract prescribed by said Brooks-Coleman act, and actually made by the parties interested in this action, is and was void and of no effect. Under such ruling, if the same be correct, it follows that the defendant Railroad and Warehouse Commission never acquired the power or authority to make any valuation of plaintiff's property, or prescribe or establish any rates to be charged by plaintiff for its public services, because the conditions precedent to the grant of such power,—namely, the making of a valid contract and agreement as prescribed by said Brooks-Coleman act,—were not, and could not be met and established; and the plaintiff and these objecting defendants are in the same situation as if the said Brooks-Coleman act had never been passed. And again, if such Chapter 278 of the Session Laws of 1921, known as the Brooks-Coleman Act, is involved because of the conditions subject to which proceedings under said act are authorized, or for any other reason, then it is the duty of the Court in this action to say so, and to render its judgment accordingly. The Court cannot wipe out the conditions subject to which the legislature of the state of Minnesota authorized the Railroad and Warehouse Commission to act, and then proceed, nevertheless, as though such authority to act had been conferred upon said Railroad and Warehouse Commission and exercised by it without any conditions whatever. All the proceedings of the defendant Railroad and Warehouse Commission of which complaint is made by the complainant in this action, have been taken, and must in [fol. 94] the future be taken, either pursuant to the consent and agreement of the plaintiff, under the terms of the Brooks-Coleman Act, or without any shadow of authority at all. In either view of the matter, the introduction of evidence or taking of testimony to determine the value of

plaintiff's property, used or usable in the public service, and the rates to be charged for such services, is unnecessary, irrelevant, and to no purpose.

The Master: Overruled.

Mr. Carman: Exception.

Mr. Richards: The City of Duluth, Intervenor, joins in making the further objection for the reasons therein just stated by Mr. Carman, and excepts to the ruling of the Master overruling the same.

Mr. Carman: May the record show that the introduction of any evidence, or taking of any testimony, or further proceedings in this action, is *is* over the continuous objection and protest of the defendant Railroad and Warehouse Commission of the State of Minnesota, and the defendant members thereof and the defendant Attorney General of Minnesota, without consent, waiver, or withdrawal of any objections heretofore made by reason of any participation of said defendants taken in the trial of the proceedings in this action?

Mr. Richards: The City of Duluth, Intervenor, makes the same statement and request.

The Master: As to those objections, all the testimony will be received subject thereto.

Mr. Mitchell: I do not know what the practice would be in this court. In the State courts, as I understand, where testimony is received, subject to objection, it becomes [fol. 95] necessary later to go back and have the specific objection passed on. I assume that all these objections will stand as overruled?

The Master: They have been overruled, and the request now is that they be not required to repeat their objections, but that the objections go to all testimony offered.

Mr. Mitchell: Their objection is to the introduction of any testimony, and of course it stands as to all testimony, even if the objection is overruled,— the fact that they take part in the trial does not amount to a waiver of any rights?

The Master: Now, what is the understanding on that? It is the undertanding that these objections go to all evidence? Or are they required to make objections as the evidence comes in?

Mr. Mitchell: My understanding is that they object to the introduction of any evidence, and that that objection,

once made and overruled, they may have the benefit of it at any time as to any evidence that may be offered in the future.

Mr. Carman: We do not mean to ask that these objections be considered as covering specific detailed objections to exhibits, or anything of that kind, of course; but, upon the grounds stated, that it applies to all the testimony and proceedings; and that the fact that we may introduce testimony of our own, or take part in the trial afterwards, shall not be considered as a waiver of any of our rights.

The Master: Is that your understanding?

Mr. Mitchell: That is my understanding.

The Master: I have here a letter from the Railroad and Warehouse Commission, signed by Mr. Yapp, Secretary, which reads as follows:

[fol. 96] (Copy)

"Saint Paul, August 11, 1923.

"Hon. T. D. O'Brien, Special Master in Chancery, United States District Court, Duluth, Minnesota.

"Dear Sir: Owing to the inability of the Railroad and Warehouse Commission to secure the consent of the parties to the proceedings before you in the matter of the Duluth Street Railway case to a continuance until after the week of August 13th, the Commission desires me to announce for your information that it will be unable to appear in the proceedings to which it is a party until at least the 20th day of August.

"The Commission was unaware of the proposed appointment of a Master until the order of the Court was made. Be assured however that the Commission has no objection to the selection of the Court. Neither was the Commission consulted relative to the date set for taking of testimony. These statements are made in explanation of absence from the hearing at this time.

Respectfully yours, (Signed) Thos. Yapp, Secretary."

(At this point a recess was taken until two o'clock, to permit telephone communication with the defendant Commission, and arrange for hearings to be continued at the convenience of all parties.)

Recess until 2 P. M.

[fol. 97] Duluth, Minnesota, August 13, 1923—2 p. m.

Pursuant to adjournment for noon recess, the hearing in the above entitled matter was continued as follows, at the same place as the previous session:

Mr. Carman: We are willing to proceed along the lines suggested by Mr. Mitchell, and take the testimony in the proceedings that he has suggested, up to the point of the testimony of the experts, and the engineers, and at that point I will renew my objections.

Mr. Mitchell: Since we were here this morning, we have a telegram from Mr. Drum, in which he says, "Program unchanged. Will arrive Minneapolis, eight o'clock Saturday evening via Northwestern." So, we shall have to ask to join in your request to go over until next week, some time, so far as the testimony of the experts is concerned.

The Master: Very well. Now, I understand that Exhibits 1 and 2 are offered and received in evidence?

Mr. Mitchell: We have offered them, subject to the right to have Mr. Drum sign the Exhibit 2, and subject to our right to have Mr. Drum qualify and give further testimony with reference to some exhibits. I should like to have read the complaint, and state what we deem to be the questions involved, and also what we hope to prove. I think it may be of value to the Master if that is done.

The Master: Yes, I am actually ignorant of any of the details. I have understood that the Commission made an order, and that thereupon this action was commenced in federal court to restrain the enforcement of that order.

[fol. 98] Mr. Mitchell: My understanding of that is this: That under Chapter 278 the contract rate which was in effect under the old franchise continued in force until the Commission had made the rate, and that when the Commission had made the rate that that was the exercise of legislative power, and amounted to the fixing of the rate by a legislative body, and that then the federal court had jurisdiction to entertain an action to enjoin the enforcement of that rate, upon the ground that the rate was confiscatory in its nature; that the federal court in this action assumed jurisdiction; they entered an order, or rather issued a temporary injunction, enjoining the enforcement of the rate fixed by the Commission, and that temporary injunc-

tion has been in force for a little more than a year. It became effective as of August 1, 1922. After that temporary injunction was issued, the Court made a further order which required the Company to sell five (5) tickets for thirty cents, with a coupon attached, which coupon is, by its terms and by the order of the Court, redeemable by the Company for five cents in the event only that the federal court, in its final determination, upholds the order of the Commission. Since that time, the Company has sold five tickets in a block with such coupons attached, for thirty cents. The complaint in this court was filed on July 17, 1922, and upon that day Judge Morris issued an order to show cause, (which was returnable on the 29th of July,) why a temporary injunction should not issue. That order to show cause was presented to the three judges, and resulted in the issuance of an injunction which has been in force since that time, and is still in force.

(Reads complaint.)

[fol. 99] Mr. Mitchell: In the affidavit used before the Court on this application, we were able to get a basis, and that was that approximately 93% of passengers might be expected to buy these tickets. In other words, on the rate of fare prescribed by the Commission, that we would not have more than seven per cent who would pay the six-cent fare, and that was based upon an experience of the only city in the country that we were able to learn of which had operated under that precise rate of fare, which was Columbus, Ohio.

Mr. Richards: I might ask counsel, Was that a good example?

Mr. Mitchell: Yes, it was, because we expect to prove, this time, by the officials of the Columbus railway just what their experience is.

Mr. Richards: I am not asking about Columbus. I am asking about Duluth.

Mr. Mitchell: We never went under this rate, at any time, this rate was never put into effect at all.

The Master: So there is no actual test on that at all?

Mr. Mitchell: Not in Duluth. That was tested, and we have evidence as to the experience in Columbus, Ohio. That was the only city we know of where that rate was put into effect.

Mr. Carmichael (referring to paragraph 12 of the complaint): The actual figure of total passengers for the year was 25,572,187,—for the whole year of 1922, and our prognostication was 25,283,892.

Mr. Mitchell: This complaint was written in the middle of the year, and we now have the full year's experience. We were a little "shy" for the last half.

The Master: Now you have this year's first six months, have you?

[fol. 100] Mr. Mitchell: Yes. We will go into that in full. We have the actual number for the seven months of 1923, up to the first of August. But the Commission estimated 27,030,000. We estimated for that year 25,300,000, approximately. There was less than 26,000,000. That is, we were within less than 200,000 of the actual number (within about 189,000), while the Commission's estimate was more than a million over the number.

Mr. Carman: The Commission's estimate was based upon what the Commission assumed the Company would have if the rate was put in. What the Company did have, was based on a higher rate.

The Master: What was it for the first six months of this year, if it does not interrupt you?

Mr. Carmichael: The first six months of 1923, it was 12,987,845; and for the last six months (with the month of July being actual figures, and the remaining five months estimated), it is 12,369,759.

The Master: That would make 25,200,000?

Mr. Carmichael: Approximately.

The Master: What were they for, July?

Mr. Carmichael: For July, it was 2,079,759.

Mr. Mitchell: Of course, this was an estimate at that time, both by the Commission and by the Company.

The Master: Yes, I understand it.

Mr. Mitchell: And I have not the slightest question that the Commission used their best judgment, and we also used ours. But we had the advantage of having a man who had been with the Company for more than twenty-five years, and who therefore knew, or at least thought he knew (and it proved that he did know better than someone else might be expected to know). Of course, he did not [fol. 101] know, and the Commission did not know, that

today the whole of this courthouse grounds would be covered with automobiles, every one of which has taken from one to five street railway riding passengers. I am not fault-finding, but we must not overlook that that is the situation, and that the private automobile is a thing that must now be taken into consideration by street railways.

The Master: Well, it is a difference of something like eight per cent, isn't it, in the estimate?

Mr. Mitchell: Yes. We were off less than eight per cent in the number of passengers carried. Now, this would yield, on our estimate a passenger revenue of $1,264,194.60, at the rate of five cents per passenger, with other operating revenues at $12,182.16 (reading from the complaint) making a total operating revenue of $1,276,376.76, and "that the operating expenses of complainant, as complainant verily believes, in the year 1922, will be not less than $1,134,479.57."

Mr. Richards: We object to any statement of actual operating expenses. That is a matter of proof.

Mr. Mitchell: Well, then, suppose I modify it by saying that we expect to prove that our operating expenses for 1922 were $1,057,330.74, to which taxes must be added, $89,468.54,—that would make it somewhat more than the estimate.

Mr. Richards: I wish to enter an objection to the statement there made, and I do not want to admit its correctness by silence. That is a matter that is subject to evidence and cross-examination, to determine what went into that statement.

The Master: Of course, that is thoroughly understood, Mr. Richards, that this is simply an opening statement [fol. 102] of Mr. Mitchell as to what he expects to prove,—not evidence at all.

Mr. Mitchell: As to the matter of depreciation that would be open to question for the experts. On the matter of federal income tax, since the action of the Commission that has been settled by the United States Supreme Court, and it is no longer an open question. (Reads paragraph 14 of complaint.) Our evidence, by men of experience, who know what they are talking about, will be, I think, that even eight per cent is not sufficient under present conditions, to produce the return which the law says we are entitled to.

The Master: Does that include depreciation?

Mr. Mitchell: No, not as including depreciation.

The Master: Eight per cent, in addition to allowance for depreciation?

Mr. Mitchell: Yes. We use depreciation as deduction from income, and treat it as a part of operating expenses.

Mr. Richards: We have not questioned the fact that depreciation should be considered. There is a difference between us of $34,000. The Commission increased our claim $15,000, and cut down their claim $19,000—from $134,000 to $115,000, which they said was 2½% on the valuation which they had found, in view of the fact that depreciation allowance for the last four years was approximately twenty per cent of the full value of the property.

Mr. Mitchell: Our complaint is aimed at the order of the Commission, and we say that by its order the Commission allowed depreciation in the *some* of $19,000 less than is sufficient, and our evidence will be offered to sustain that contention.

The Master: Referring to these tables in Exhibits 1 and [fol. 103] 2, that you said you agreed upon. I do not know whether the land was agreed upon, *of* not.

Mr. Mitchell: No. The land was not agreed upon. There are certain reconciliations to be made, which can be furnished later. The inventory was agreed upon.

Mr. Richards: Yes, the inventory of the land was agreed upon. but the valuation was not. There was a contest of an item in the sum of $31,000 regarding the Seventh Avenue West paving and condemnation proceedings, that does not seem to be mentioned in the Commission's order.

Mr. Mitchell: The point is, speaking briefly: We won't bother the Master as to any of those bases of physical property, except the land. Unless we should reach some agreement about that, we will offer evidence on that.

The Master: You say that the matter of the federal tax has been decided?

Mr. Mitchell: Yes, in the Galveston case. We will call your attention to that later. It has been decided at least twice, and they hold now that it is deductible from income, and treated as an operating expense. Now, the order of the Commission was dated July 13, 1922, and on the 17th day of July this action was started. The bond which was

signed at the time the injunction was issued was dated July 31st. Judge Sanborn gave the decision and I will not read that now. But we are in better position, now, after a year's experience, to make a showing. There have been submitted to counsel on the other side copies of our exhibits, for their examination, detailed statements. (Describes exhibits 3 to 27, inclusive, and exhibits 29 and 30,—exhibit 28 to be included later.)

[fol. 104] The Master: Let me ask you, so that we will understand as we go along: Do you understand that this case is directed to the propriety or impropriety, in itself, of the Commission's order, or that the case is being tried as practically de novo?

Mr. Mitchell: I understand that this action is an action to determine, or to have the determination of the Court on the Commission's order, which is the only order in existence that fixes a rate. I understand that the effect of this action is, if our contention is upheld, for the Court to say that that order is improper, and that the Court will go further, as I understand,—as they always do,—and say, in effect, that an order should be made by the Commission, which will allow not less than a certain rate of return upon a certain valuation. That is what I understand the Court will do. This Court, no more than the State court of Minnesota, cannot fix a rate; but this Court can and does, in these cases, determine what is the fair valuation of the property, and it determines what is the fair rate of return upon that valuation, and then, of course, it can determine. Here is a condition that has existed for a year, and we will contend that no guesswork is necessary as to whether the rate fixed by the Commission was sufficient, so that our idea is that what we are asking for is an order that that rate is void because it is confiscatory, and that any rate which does not allow a return of so much will likewise be void. But this court—and I am speaking of this proceeding now as in the federal court—this court cannot say that the Commission can put in a rate of so much, but it can say that the Commission is enjoined from putting in a rate of less than so much, or that the Commission's rate must permit a return of so much.

[fol. 105] The Master: I doubt whether it could go so far as that, but it might say that the order is confiscatory, and that the rate would be enjoined on condition that you did

not charge more than so much, until the Commission acts again. But it leaves the Commission absolutely free to act at any time.

Mr. Mitchell: That is possibly right.

The Master: Of course, there is no question that the City has a right to show lower valuation, or operating expenses, if they can do so.

Mr. Mitchell: Well, we are attacking the order of the Commission and I think that the Commission is the only necessary—perhaps the only proper party in this proceeding. Since this order was made, allowing the City to intervene, the United States Supreme Court has held in a case which is, I think, not different from this at all, that the City was not a proper party. That decision had not been handed down when the order was made.

The Master: That was the New York Telephone case?

Mr. Mitchell: I have forgotten. It was a very recent case, I know. I thought when I noticed it that that was not unlike this case. But we do not object—I think that I said to the Judges, in effect, that while we did not want to stipulate that the City might be made a party, we assumed that the Court would permit it.

The Master: Does the statute give the municipality a right to be a party?

Mr. Mitchell: I do not suppose it does, in this proceeding, but we have raised no question about that, and we are not raising any question here. I understand that the sole [fol. 106] and only question at issue here is whether or not that order of the Commission is confiscatory. I think that they can offer any evidence to show that those values are too high, and the effect would be to uphold the order of the Commission. And I should not object to that kind of evidence, because our excuse for going into this court (or our reason, rather) is that we claim that that order is confiscatory, that it confiscates our property. That is the only question involved.

Mr. Richards: Is it your theory that this federal court has a right to hold that any result that produces less than 7½ per cent on the value approved is confiscatory?

Mr. Mitchell: I think this court has the right, and I think it is its duty to determine, as a judicial matter, what is a fair value and what is a fair rate of return, and then it

follows, as someone says, "as the night the day" that any rate of fare that does not produce that return, is not a sufficient rate of fare, but just now I do not think that we need to bother ourselves about that particular thing. I understand that they may offer any evidence that they can to uphold the order of the Commission. I think I am safe in saying, however, that it is practically certain that, if the Commission's valuation were accepted by us, and if its rate of return were accepted by us, that its order is void. That is, if its valuation and rate of return were established in this court,—with those two things established—that the order is void, because of what we claim.

Mr. Richards: You are assuming that 7½ per cent—that anything less than that is a confiscatory rate?

Mr. Mitchell: No. I am saying nos that if we did stipulate, if you people did agree that nothing less than 7½% is sufficient, and if we agreed that no valuation less than $4,-[fol. 107] 599,000 was sufficient at that time, then I say you have "agreed" yourselves out of court, because on that basis——

Mr. Richards: You are confounding a just and reasonable rate with one that is confiscatory.

The Master: I think I understand that on the valuation as found by the Commission—, and the necessary return as found by the Commission ($345,999), they must succeed in this case because they have not made $345,000 on the full six-cents rate. That is their theory?

Mr. Richards: Yes.

Mr. Mitchell: Yes.

The Master: I wanted to get at the fact that Mr. Mitchell had a right, if he desired, to show a smaller value, or smaller operating expense, or larger return, or less rate of return,—that those things were not foreclosed by the order of the Commission. The Commission's order certainly o-ght to be given great respect and consideration and probative force, but it is not binding in this case, is it?

Mr. Mitchell: I do not think it is, either way. That is, we are attacking that order. The City is an intervening defendant. And now I think it is very questionable, if we came right down to what they would be allowed to do, just where they might stand. But I think the Commission itself can justify its order, by offering evidence that the return

is too high as allowed by them, or the value as fixed by them is too high. In other words, we are not here to try to shut them out from offering their evidence before this tribunal.

Mr. Carman: I think the point that Mr. Richards suggests is that it should be kept in mind that the Commission, [fol. 108] in making that valuation was acting under Chapter 278, which perhaps contains some of the requirements as to valuation that do not correspond with those adopted by the federal courts; and that also, in so acting, the Commission was not seeking to establish a rate of return that was fairly non-confiscatory—It was seeking to establish a rate of return which the Act required, as a reasonable and fair rate of return. In other words, the question of making the return down to a point where it could go without being confiscatory, is not the question before the commission at that time. They can order a rate, and that is the point at issue in this court.

Mr. Mitchell: I agree that theoretically there is a "twilight zone" between a rate order that is unreasonable, and one that is confiscatory, but I confess I have never yet found a decision that applied to it. It is not unusual to find language such as Mr. Carman has used, but the decisions that we will rely upon here, and which have been handed down since this hearing before the Commission, are all decisions in cases brought under the claim of confiscation and the rates that they used, and which we will contend are rates below which, and values below which what would be confiscatory. I want to say that the Company, in its books, after the order of the Court requiring the coupons to be sold, have charged into a reserve account the amount of these coupons outstanding, and I mention that so that any one examining the books will not by any chance think that there is a discrepancy between our exhibits and the books. Our books will show for that period an item of $72,991.23 in a reserve fund, and this operating income will be that amount less than is shown here.

Mr. Richards: One question, Mr. Mitchell, if you please. The Company filed an annual statement with the City [fol. 109] Auditor and in that they gave account of their receipts and disbursements. I wish to inquire whether, in that statement, you have charged yourselves with this im-

pounded money in any way, growing out of the possible rebate of five cents?

Mr. Mitchell: My understanding is that the income would not show the receipt. The money was received——

Mr. Richards: I see. That answers the question.

Mr. Mitchell: In other words, the reports to the City are in accordance with the books, and to make them conform to what we are showing here, the reserve, or the oustanding coupons, would be added to that.

Mr. Richards: Yes, I understand now. Speaking of our exhibits, these matters are very important, and I think it necessary to put them in in this detail. We want the other side to have the fullest opportunity to examine these exhibits, and also to examine the books. The reports that have already been asked for have been furnished to the Commission. I do not know, myself, just what those have contained.

At this point a recess was taken by adjournment until ten a. m. the following morning, Tuesday, August 14, 1923, at the same place.

[fol. 110] Duluth, Tuesday, August 14, 1923—
10 o'clock A. M.

Pursuant to the adjournment, the hearing in the above entitled action was resumed and the following proceedings where had:

Mr. Carmichael: We have prepared in bound form the exhibits which we have available and I will state for the information of Mr. Richards and the Attorney General's office that Exhibit 4 is identical to the exhibit that was introduced in the hearing before the Commission, with the exception that at the last part of the exhibit we show the two additional lots which have been purchased by the Company for the loop at the end of the East Ninth Street extension, since the hearing before the Commission. These are Exhibits 4 to 30 inclusive, except Exhibit 28 which is not yet included.

Mr. Carman: We understand these exhibits are now being formally offered in evidence, or are they to be offered in connection with testimony, one by one, as they come along?

Mr. Carmichael: Your latter understanding is correct.

The Master: I have Exhibits 4 to 27 inclusive and Exhibits 29 and 30.

Mr. Carmichael: Yes, and they will be offered in connection with the testimony of the witnesses during the course of the day in consecutive order. I will call Your Honor's attention that on Exhibit 14 there are two exhibits, one is number 14 and the other show- the detail sheets supporting it, and computed therefrom, and marked Exhibit 14-A. I will call Mr. Cheadle.

[fol. 111] H. W. CHEADLE, sworn on behalf of complainant, testified as follows:

Examined by Mr. Carmichael:

Q. Mr. Cheadle you are a resident of Duluth?

A. I am.

Q. A man of approximately what age?

A. Fifty-eight.

Q. And you have resided in the City of Duluth for what period of time?

A. Thirty-seven years.

Q. And what is your present business, Mr. Cheadle?

A. Real estate business.

Q. Connected with what firm?

A. Richardson, Day & Cheadle Company.

Q. How many years have you been connected with that firm in the real estate business?

A. Under different names, from 1886 to 1892 and from 1912 to date.

Q. During the period from 1892 to the year 1912 what business were you engaged in?

A. Eighteen years of that I was in the City Clerk's office, twelve of which I was City Clerk.

Q. You were City Clerk during the last twelve years of that period?

A. Yes sir.

Q. That would be from 1900 to 1912?

A. Yes sir.

Q. And do I understand that you resigned your position as City Clerk and again entered the real estate business with the firm you are now connected with?

A. Yes sir.

Q. Now, Mr. Cheadle, the firm that you are connected with, does it deal extensively in property in the City of Duluth?

[fol. 112] A. Generally in property all over the city, yes sir.

Q. Your activities are not limited to any one locality, is that correct?

A. That is correct.

Q. Do you make it a point, in your business, to keep yourself familiar with real estate values?

A. Yes sir.

Q. Are you a member of the Duluth Real Estate Exchange?

A. Yes, sir, the Duluth Board of Realtors.

Q. And during 1921 were you a member of what we call the Valuation Committee of that Exchange?

A. I was.

Q. Who were the other two members?

A. R. H. Doran and J. E. Cooley.

Mr. Carmichael: I will say at this point that Mr. Warren will testify as to the property in Exhibit 4 that is owned by the Company, to form the basis for Mr. Cheadle's testimony. Mr. Warren will be the next witness.

Q. Did you, in company with the other two members of that committee value the then real estate owned by the Duluth Street Railway Company?

A. I did.

Q. Is the valuation that you then made set forth in plaintiff's Exhibit 4?

A. It is.

Q. Do the values therein set forth, Mr. Cheadle, in your opinion, correctly set forth the fair market value of the property at that time?

A. It does.

Mr. Carman: Just a moment. We object to the witness giving any opinion in that line as to the items on the last page of the exhibit, being property acquired since the Commission made its valuation of the property of the Street Railway Company, when it made the order fixing the rates which are involved in this action. I would suggest that

[fol. 113] the witness be asked to give his testimony with reference to the other, to which there would be no objection made.

Mr. Richards: And we ask to have the answer stricken out.

Mr. Carman: Yes, I move that the answer be stricken out.

Mr. Carmichael: The last question does not include the last *tow* lots.

Mr. Carman: Then the objection is withdrawn.

The Master: Is there any date agreed upon between you gentlemen, as to when the property is to be taken?

Mr. Carmichael: We are going to bring Mr. Cheadle's testimony down to June 30, 1923. That is approximately the nearest date that we can come to, to get the value before your Honor. That is our plan.

Mr. Carman: Our objection to the valuation being stated as to the property acquired since the Commission made its valuation, and also as to the valuation being stated as of this time, is this: Chapter 278 of the Session Laws of Minnesota of 1921, known as the Brooks-Coleman law, under which the Commission acted and which is the sole source of power for the Commission to act, contains provision for a re-valuation by the Commission at any time, makes it compulsory for the Commission to make such re-valuation upon the request of either party interested as to property since acquired, and leaves it optional with the Commission, and to its own initiative, to do so. I will read for the record from Section 8, Chapter 278 Session Laws of Minnesota 1921 as follows——

Mr. Mitchell: Mr. Carman, it may save time, but the tesmony now submitted has to do only with the property that [fol. 114] was owned by the Company at the time the Commission's order was made.

Mr. Carman: But I understand the witness is testifying now as to the value of the property now, on August 14, 1923.

Mr. Carmichael: He has not been asked that question yet.

Mr. Mitchell: This exhibit, you will notice, is dated,— this valuation is made as of July 1, 1921.

Mr. Carman: As to his answering regarding to the valuation on July 1, 1921, there is no objection to that.

Mr. Mitchell: I speak as of that time. I think I will suggest that the Master is, perhaps, very properly anxious to know what it is all about. We concede that we are attacking the validity of the order of the Commission, and that that is all that is involved in this dispute, and anything that throws any light on that question is involved in this hearing. Now, that means this: That all of the values as they existed at that time come before the Master, and all of our testimony as to values is brought to that time, Drum's report, and eevrything, is as of that time. As a matter of fact, it is the exact report that went before the Commission. Just at that time there was a certain amount of speculating done. This court granted a temporary injunction upon the ground that the guess or estimate of the Commission as to the business was not sound. Now the [fol. 115] evidence, I take it, as to what has happened since the order was made is admissible merely as explanatory and as verifying the estimates and positions that were taken at that time, but we are here to attack the validity of the order of the Commission. That is the only thing of which this court has any jurisdiction. I think that both sides of the table, with that explanation, will see just what we are driving at. We will offer evidence to show just what has happened in the past year, and we will offer evidence as to what we think will happen for the next year. This is just the beginning of the evidence that was brought before the Commission, and it is merely to aid us in determining what the effect of the Commission's order will be, on this valuation. The question of the expenditures for the past year, past expenditures, we deem to be competent, because it is necessary in connection with our estimates for the future, but the primary thing is the order which we are attacking.

Mr. Carman: The position which the Commission takes is this: That all the evidence as to what has happened since, and as to expenditures made since the valuation was made by the Commission, is irrelevant and immaterial, and cannot be considered in this action. That gets back to the Brooks-Coleman Act again. The Brooks-Coleman Act provides among other things in Section 8 that:

"After making a valuation and prescribing a rate at any time thereafter the Commission may on its own initiative,

and shall upon the application of the City or the Street Railway, from time to time, make such investigation as to any change in property value or cost of service as may be reasonably necessary, and after a full hearing as herein provided, make such order confirming existing rates or changing rates as may be just and properly regulate the rate of fare hereunder."

[fol. 116] The Master: Well the Commission has made its order.

Mr. Carman: Yes but it has not made any order and it has not had before it, and it is not trying to enforce anything with reference to the valuation of property that has been acquired by the Company since, nor as to any valuation as of August 14, 1923. The sole thing before this Court is the order of the Commission based upon the values made at the time the hearing was had before the Commission, and upon the property which the Commission had before it. It may be conceded that they may introduce additional and other evidence as to the value of that property, evidence not before the Commission.

Mr. Mitchell: It was introduced before the Commission.

Mr. Carman: We contend that they can not come in here and have a re-valuation. I think that we might as well recognize the fact at the start, that the real object of these proceedings in the Federal Court is not to obtain an injunction, but to obtain a re-valuation of the complainant's property in the Federal Court, and have the Federal Court prescribe the rates that the complainant may charge. That, we contend, is beyond the power of this Court under the Brooks-Coleman Act, under the two provisions to which complainant has consented, and under which the Commission gets the authority for these re-hearings and re-adjustments of rates, as often as required, and as often as the Commission sees fit,—either at its own option or at the request of any one. It does not appear here and can not be made to appear or assumed that the Commission was [fol. 117] lax in the performance of its duties as to any future time beyond the period when its valuation was made, and its order prescribing the rates was made. We contend that for this Court now to undertake to prescribe in advance what the Commission shall do with reference to fixing rates, upon any new valuation, is simply

for the Court to usurp the powers and duties of the Commission and make itself a rate-making body. However plausible the theory may be that we are only trying the question of an injunction, that we are only seeking to determine whether or not the rate fixed by the Commission is confiscatory, it does perpetually crop up, and it shows through all the thirty exhibits which council for complainant indicates that they are going to offer, what they really want, what they are trying to get, for what these are offered: That it is a valuation of the Street Railway Company's property by the Federal Court, and a rate fixed by the Federal Court and prescribed not only as to the valuation of the property at the time the Commission made its valuation, but as to now, and as to the future. Our objection, therefore, goes to any testimony of this witness concerning the value of any property acquired since the Commission had its hearing, and included in this exhibit. The objection on the question may be somewhat premature, but since the statement has been made, I take the liberty of setting this out in the record so that the Court may better understand the objection that will be made from time to time as we go along.

Mr. Richards: The City endorses and makes the same objection and takes the same position, that this is a trial [fol. 118] of the validity of the order of the Commission at the time it was made, on the facts before the Commission, and that the sole question before the Court is whether the rates established are confiscatory.

The Master: Well, as I stated yesterday, I have no power to rule on these questions finally. The matter certainly is not open to the objection that it is so scandalous that I would be justified in refusing to receive the testimony. My own judgment is that there is a rather fine line dividing what would be entirely proper and what would not be proper. For instance, it seems to me that the order must be judged of by the situation as it was at the time the order was made; but, that in the absence of any marked change in conditions since that time, that must be considered to be a continuing order unless the Commission itself, of its own motion should attempt to change it; and if it results in confiscation, it amounts to a continued attempt to confiscate property. It is unnecessary, in other words, for the corporation to go to the Commission every three or

four or six months and ask it if it won't change its mind. If it is confiscatory and it continues, with no marked change in the circumstances, that must be considered as a continuing attempt. But probably it could be judged of by the situation as it existed at the time the order was made. Yet, there is a great deal of testimony proper as to conditions after the order was made. It is quite common for the Supreme Court of the United States to order a test period of trial, and these test periods are always based on subsequent occur-ences.

[fol. 119] Mr. Carman: That is what the Commission was not allowed to have in this case, a test.

Mr. Richards: In that class of cases I notice frequently they refuse to grant an injunction, but they say, go ahead and try it and then you will have the privilege of coming in before us again on a showing of actual facts proven since, by test.

The Master: Of course in those cases there must be some testimony introduced as to subsequent occur-ences.

Mr. Richards: In the later application, yes.

The Master: Under any circumstances they are testing an order or a legislative act by subsequent events, aren't they?

Mr. Richards: But the distinction would be that that subsequent test is made under a new application based upon actual experience since the order went into effect, it is not the old application that is changed, it is a new one.

The Master: Now always, because sometimes a preliminary injunction is denied and the case is open while the test is being made. To some extent you have a test here, you have some $72,000, I think council said, which has been placed in a reserve fund.

Mr. Carman: The case here before the Court is one in which two years have elapsed since the property was valued by the Minnesota Railroad and Warehouse Commission. We claim that the caluation of the Street Railway Company now, at this stage, with these additions and betterments, is not proper subject matter for the Federal Court to try.

[fol. 120] The Master: Supposing conditions had changed in the last two years, that the cost of labor and material had gone down, and the population of Duluth had greatly increased, so that an order that was possibly confiscatory

two years ago would be perfectly valid now. Don't you think it would have to *ge* sustained?

Mr. Carman: I do not think so.

The Master: You think it could be set aside by the Court now, although not confiscatory at this time?

Mr. Carman: I don't think the Court would take the testimony to determine what the value was as of this time. The Commission has not done so, and in doing that the Court would not be passing upon the order of the Commission that was made, but would be attempting to make a new order, a substitute for that.

The Master: Well, I think it is a very interesting question. I would like you to formuate your objections. Your idea is that the test to be applied in this action has reference to the propriety and validity of the order at the time it was made?

Mr. Carman: Exactly.

The Master: And that no change in conditions since that time, either any decreased or increased valuation or increased or decreased earnings, could be taken into consideration?

Mr. Carman: Not as to determining whether or not the order of the Commission should be sustained. We claim that that amounts to a re-valuation of the property and not to a trial of the sole question of which the Federal Court has [fol. 121] jurisdiction. That is, the question whether or not the valuation made by the Commission and the rates prescribed by the Commission, based upon the valuation, if put into effect, would confiscate, or would have confiscated the property of the complainant. In other words, we want the case confined to the Federal question.

The Master: And if there is a change in the situation which materially affects the results, the remedy is, to recur to the Commission?

Mr. Carman: That is our stand exactly. Your Honor, we rely upon the Brooks-Coleman act, Chapter 278 Session Laws of Minnesota 1921,—that this act, to the terms of which the complainant consented, makes provision for a modification of the rates at any time when changing conditions require it, and that the Street Railway Company can not have that modification made here in this Court before it has even attempted to have it made by the Railroad and

Warehouse Commission, which was granted the exclusive power to make it in the first place.

Mr. Richards: The City of Duluth, amplifying, or merely repeating what Mr. Carman has said, calls attention to the fact that the offered testimony claims that betterments must be added to the capital base, and in addition to the value, assumes that their policy of betterment, added in course, is an actual addition to value. The City of Duluth, calling attention to the finding of the Commission itself, is prepared to argue that that assumption is erroneous. The original statement was that the Company has made certain additions to the property since the date of July 1, 1921, and from the report of the company, the net addi- [fol. 122] tion from July 1, 1921 to December 31, 1921, was $6,978.22, and because that net addition was found to have been made since July 1, 1921, the Commission simply bodily transferred it and added it to the value that it had previously found, the $4,593,000. Now does that add to the value? Does that follow, as a matter of fact? It is as an operating system that it has value. I remember, once, making this point, in the City of Duluth, that the assessment made for the improvement of a street, the cost of it, was an addition to the value of the property. That was found to be erroneous. The Court has repudiated that. The cost of the assessment for making the street improvement in front of a lot is not necessarily an addition to the value of the property. The value of the property or of the abutting lots is something different, arrived at from different basis; and a party assuming to add to his previous estimate of value the actual cost of making an improvement in front of his lot, is in error. I think the Court has taken that position. Now when they come here and offer $2,100 as new lots cost, or when they come here and put in estimates of value of betterment, tracks and other things of that kind, and assume that the cost of the addition must be an addition to the value, in that term, as an operating system, they have failed to apply any of the tests of value to those betterments. They have failed to apply any of those tests to the alleged value of these additional lots, that they put on. It does not follow that, because there was so much money spent, it was an addition to the value of the plant as an operating system. The City joins in all the ob-

[fol. 123] jections for the reasons stated by Mr. Carman for the Railroad and Warehouse Commission, and understands that the question before the Court now is: Was that rate at the time it was made confiscatory?

The examination of the witness was continued as follows:

By Mr. Carmichael:

Q. Mr. Cheadle, as of what date was that valuation made?

A. July 1, 1921.

The Master: And when was the valuation actually made?

The Witness: The same date, July 1, 1921.

Q. Now, Mr. Cheadle, relative to the property that was valued at that time by you and the other two gentlemen that you have mentioned, Mr. Doran and Mr. Cooley, what is the condition as to whether there has been any increase or decrease in the value of the property since July 1, 1921, to June 30, 1923?

Mr. Carman: That is objected to as immaterial and irrelevant, and not within the issues made by the pleadings in this action.

Mr. Richards: The City of Duluth makes the same objection.

The Master: The objection is overruled and an exception may be noted to the ruling.

A. They are practically the same at the present time as when the valuation was made.

[fol. 124] Q. Has there been any material change that you know of?

A. There has not.

Q. Mr. Cheadle, are you familiar with Lot 21 and Lot 22 in Block 19 East Lawn Division, City of Duluth?

A. I am.

Q. What, in your opinion, is the fair market value of those lots as of June 30, 1923?

Mr. Carman: Objected to on the same grounds and for the same reasons stated at length in the last two objections made.

Mr. Richards: In which the City joins.

The Master: The objection is overruled with the reservation that whether or not it should be included in the property in the final determination is to be decided later.

Mr. Carman: Note an exception.

Mr. Mitchell: To avoid confusion we want to change that date to "prior to June 30th," I notice the money was paid over in May so that our cutoff date may be as of June 30th.

Mr. Richards: May it be understood that an exception is noted to the rulings without repeating each time?

The Master: I think so.

Mr. Mitchell: I would like to suggest that in some way we avoid the necessity of taking formal exceptions.

The Master: It will be understood that where an objection is made and the testimony is received, it is received over the objection, and saving an exception, the ex-
[fol. 125] ception to go to either party who makes the objection or against whom the adverse ruling is made. But I would like the objections made simply for my own education.

Mr. Carman: It would more than please me to follow that rule, but I noted the exception at the time because I specifically asked to have that done, in the Federal Court once, and the Court stated that that practice would not be followed then.

Mr. Richards: All right, we will follow that, so far as I am concerned.

(The question was read as follows by the reporter: "What, in your opinion, is the fair market value of those lots as of June 30, 1923?")

Mr. Carmichael: Subject to Mr. Warren's testimony to the effect that all the property mentioned in Exhibit 4, including Lots 21 and 22, Block 19 East Lawn Division is owned by the Company, we offer complainant's Exhibit 4 in evidence.

Mr. Carman: We object on the same grounds, and for the same reasons stated at length in the last three objections made.

Mr. Mitchell: That objection would apply only to the last two lots?

Mr. Carman: Yes, it would apply only to the last two lots.

The Master: It will be received.

Exception by defendants and City Intervenor.

Mr. Carmichael: You may inquire.

[fol. 126] Cross-examination:

By Mr. Richards:

Q. Your answer, Mr. Cheadle, related to both page 1 and page 2? I notice you have before you the Exhibit 4?

A. I have before me Exhibit 4, but with the pages not numbered. There are three pages included, not numbered.

Q. Number 3 is the last page?

A. Yes, sir.

Q. I would suggest that we agree to number them 1, 2 and 3. Referring now to page 1, which relates, in part, to the easement in Seventh Avenue West on Superior Street, or midway between Eight- and Ninth, which would be the right of way of the Seventh Avenue West inclined railway, did your answer, heretofore given, mean to include that?

A. Yes, sir.

Q. Now, what was the nature of that easement?

A. It amounted to a right to exclusive use of the avenue, I think twenty-eight feet wide along the center from Superior street to the alley, between Eight- and Ninth Streets

Q. That structure was placed there in a City street,—the inclined street railway was built in a City Street, was it not,—Seventh Avenue?

A. It was what had been a City street.

Q. What had been a city street?

Mr. Mitchell: It never had been improved any?

A. No, it never had been improved.

Q. Had that avenue ever been vacated?

A. No, but according to my recollection, there were condemnation proceedings carried through by which they got this right to put the structure there.

[fol. 127] Q. That is right. Then the fact is, that the ground on wrich that structure is built was on the ground in which the City of Duluth already had an easement for public purposes as an avenue?

A. That is correct.

Q. And that condition has always existed since, and existed up to the date of the making of this order by the Commission?

A. I don't so understand it.

Q. What?

A. I don't so understand.

(Question read by the reporter as follows: "and that condition has always existed since, and existed up to the date of the making of this order by the Commission?)

Q. Put it in another way. You are not claiming that the Duluth Street Railway Company had any interest in the fee of this avenue of the City?

A. No, sir.

Q. At any time?

A. No, sir.

Q. And if this structure should be removed, the right of the public in the avenue would still exist?

A. Yes, sir.

Q. In fact, the right of the public in the avenue has not been interfered with—that is, it has not been parted with?

(No answer.)

Q. And this money, $46,835, does not that specifically represent the amount of money paid as damages to the abutting owners?

A. No, sir.

Q. What does it represent.

A. We had that,—if I am allowed to——

[fol. 128] Q. Explain what happened.

A. We had that up before our appraisal committee, and two of the committee, myself and another, differed very materially as to the basis on which the amount should be determined. One of the commission took the position that that practically amounted to the ownership of the real estate, while I took the other position, that it was a question of what that easement was worth to them. But, after we had threshed it out for an hour or so, we found that by our two methods of computation, we arrived at almost exactly the same amount, as the value. Therefore we did not go ahead and determine what basis, so long as we agreed on the amount.

Q. Well, was your view that the original cost represented the present value?

A. No, sir.

Q. I mean, was it your view that the original damage paid one abutting owners was the equivalent of the present value of the easement that the Street Railway Company had in this avenue?

A. Not at all.

Q. Well, I might ask you, what basis did you use to determine what the value was?

A. To one familiar with the situation at the time of the construction of the incline,—You will recollect a large number of property owners waived any question of damages on account of the benefit to other property which they had, by reason of the construction of the incline. So that an amount awarded as damages, or paid as damages, was not a full measure of the value of the easement, at all.

Q. Well, the value of the cost, you mean?

[fol. 129] A. Not a full measure of the value of the easement.

Q. That is, the value might have been greater, based upon cost?

A. Yes. The value undoubtedly was a great deal greater than the amount paid as damages.

Q. Do you recollect now approximately what was paid in damages to abutting owners by the Street Railway Company for the easements that they got?

A. I do not. I looked it up at the time that our commission acted. I have not had occasion to look it up since.

Q. Was the amount that they actually paid less or greater than this $46,835?

A. It was less.

Q. So that you must have concluded to have added something to what the Company actually paid, in determining what the value of that easement was to it?

A. I made the value larger than the amount that they actually paid in money.

Q. This easement was to occupy the avenue until abandoned by the Street Railway Company?

A. As I recollect it.

Mr. Mitchell: That is, it was a perpetual right?

A. So I understand.

Q. It would be optional for the Street Railway Company to abandon it?

A. I don't know.

Q. The Street Railway Company is under no contract with abutting Owners, that you know of, to perpetually stay there and operate it?

A. Not that I know of.

Q. And if the Street Railway Company did abandon that incline, there would be no fee left in them to sell?

A. No, sir.

[fol. 130] Q. There would be no salvage to the Company?

A. From the easement?

Q. Yes.

A. Not as I understand it.

Q. The only salvage would be what they could get for their steel structure plant used in the operation?

A. I don't know about that, I am not an expert along that line.

Q. I see. But the fee is in the abutting owners, subject to public easement as an avenue?

A. Yes, undoubtedly.

Mr. Carmichael: That is objected to as not stating the situation. There is an easement perpetual in the Street Railway Company.

Mr. Richards: What is that?

Mr. Carmichael: An easement to maintain a structure there.

Mr. Mitchell: If the Street Railway were permitted to abandon and remove these tracks, as the situation now stands, there would be a "paper" street there, a "paper" avenue.

The Master: It is referred to in Exhibit 4 as Seventh Avenue West?

Mr. Richards: Yes, Your Honor.

Mr. Richards, continuing:

Q. Was there any difference of opinion between the members of the appraisal committee in regard to the value of these different lots mentioned in this list on Exhibit 4, page 1 and page 2?

[fol. 131] A. Why, there probably was some difference of opinion before we determined the value,—by the commission—I don't recollect any case where there was any par-

ticular difference in our opinions. We went on to each tract and considered it from all sides,—right on the property itself.

Q. I notice from the statement here, Mr. Cheadle, that you say, "We certify that we have no personal interest in the above described property and that in our opinion said property is worth the amount set out in the description." Now, did any of these three commissioners have any interest in the results of the effort of the Street Railway Company to get a raise in fares in the City of Duluth, to your knowledge?

A. Only so far as we probably all are property owners, and are benefited generally by the extensions which the Street Railway Company might be enabled to make.

Q. Now, as a matter of fact, Mr. Cheadle, you have been really pronounced in favoring an increase of rates to six cents, for the particular reason, have you not, that they would thereby, perhaps, be able to make the extension?

A. That is partically stating it, Mr. Richards. I think it is of great importance to the City of Duluth or any other city that its street railway company be a going concern, one that can properly function as a street railway company, and make necessary extensions, and have the proper equipment.

Q. And you are interested particularly in the Ninth Street extension?

[fol. 132] A. Personally I was very slightly interested in the Ninth Street extension, except that our firm represents considerable property in the Ninth Street extension.

Q. And you wanted that extension made?

A. Yes, sir.

Q. And had worked for it strenuously?

A. I co-operated with the City in working for it, yes, sir.

Q. Now, isn't it possible that your estimate of value might have been affected by your interest in that?

A. Not in the slightest.

Q. Well I am simply asking, Mr. Cheadle. Was Mr. Cooley interested in this question of extension, to your knowledge?

A. I don't think so.

Mr. Richards: That is all.

The witness was then cross-examined on the part of the defendants as follows:

By Mr. Carman:

Q. Mr. Cheadle, I don't know whether I understood you correctly or not with reference to the value of $46,835 placed on the easement in Seventh Avenue West from Superior Street to midway between Eighth and Ninth Streets, as shown on page 1 of Exhibit 4. Did I understand you to say that this value which you placed was the same value that you would place on the same property, if it had been run through the private property there without the streets having been laid out and established before that time?

A. No, I did not make that statement.

Q. You think that would make a difference?

A. I don't know.

[fol. 133] Q. You don't know?

A. I know that that was approximately the valuation as given by one of the commissioners,—not my valuation, but that is the way that he arrived at the amount.

Q. You mean by that, one of the members of the Railroad and Warehouse Commission?

A. No,—this commission, which made this valuation in the appraisal.

Q. So that you are not prepared to say whether your valuation would be the same if there had been no streets there?

A. Yes. I think my appraisal would have been a larger amount if there had been no street there.

Q. Can you give us some idea of how much larger amount it would have been?

A. Not offhand. That would necessitate figuring up on each particular street, the valuation. I noted at the time that I thought that Mr. Doran, who took that method, was very moderate in his estimates of the values.

Q. Now, leaving that, and taking the general description of the lots covered by Exhibit 4, are all of the lots covered in your valuation here in Exhibit 4 property which is used exclusively by the Duluth Street Railway, or are some of them used jointly by the Duluth and the Superior Street Railway companies?

Mr. Mitchell: I suggest that you ask Mr. Warren about that.

Mr. Carmichael: I suggest you leave that now because the exhibit is only offered subject to Mr. Warren's checking up on it. This witness probably does not know about that.

[fol. 134] Mr. Carman: Very well. I will withdraw the question.

Redirect examination.

By Mr. Carmichael:

Q. Exhibit 4 was signed in duplicate and the one presented to the Master contains the original signatures, can you tell us, Mr. Cheadle?

A. Yes, sir.

Q. Mr. Cheadle, what is the condition of Seventh Avenue West where the incline is, as to whether or not it was ever opened by the City for street purposes?

A. It never was opened.

Q. Is there any probability that it ever will be opened in the course of the next hundred years, that you know of?

Mr. Carman: Objected to as incompetent, irrelevant, immaterial.

Q. Well, I mean in any measurable time in the future that you think of.

A. I cannot see how it is possible to use that avenue as a whole.

Q. This inclined structure is a structure above the ground, supported on steel trusses?

A. Yes, sir.

Q. On a limestone base, it runs right along in front of the lots abutting it on to the street, on to the avenue, runs right along in front of the lots?

A. Yes, sir.

Q. And this use by the Street Railway Company amounts to an exclusive use of that avenue?

A. To the portion occupied by the structure, yes.

[fol. 135] Cross-examination continued:

By Mr. Richards:

Q. You do not mean by that statement, "exclusive use," that it has not such use underneath the steel structure, and going across from one side of the avenue to the other?

A. Practically. I don't think there is any place except at street intersections where you can go across. There may be one or two places where that could be done, but generally you could not go across from one side of the avenue to the other with any vehicle.

Q. That is, steel fences that support the upper structure are tied together at the base of the structure across the avenue?

A. Yes, criss-cross. I don't think there is any place——

Q. Doesn't the City use any portion,—or the public,—use any portion of that under the incline?

A. Only for access to and egress from the inclined railway.

Q. And does that inclined railway occupy the full width of the avenue?

A. No, sir, I understand it occupies twenty-eight feet, and there are sidewalks on one side and part of the way on the other side.

Q. And in places, isn't there room for roadway up and down between various blocks?

A. No, sir.

Q. But on the streets, where the streets intersect the avenue, there is full passage for the width of the street?

A. Yes. That is different construction, under the elevated structure.

[fol. 136] HERBERT WARREN, sworn on behalf of complainant, testified as follows:

Examined by Mr. Carmichael:

Q. Your name is Herbert Warren?

A. Yes.

Q. Your business is what, Mr. Warren?

A. I am Vice President and General Manager of the Duluth Street Railway Company.

Q. How old a man are you, Mr. Warren?

A. About fifty-eight.

Q. How many years have you been connected and engaged with the Street Railway corporation?

A. Since 1885.

Q. Where were you first engaged and in what capacity?

A. I was first engaged in street railway work in St. Paul as a storekeeper and storehouse boy, and as assistant to the cashier.

Q. For how many years did you remain in St. Paul?

A. Three or four years.

Q. And then where did you go?

A. I went to Minneapolis.

Q. And you remained in Minneapolis until when?

A. Until 1893.

Q. State generally what your duties were while connected with the Street Railway operations in Minneapolis.

A. Well, in Minneapolis I was purchasing agent most of the time.

Q. On leaving Minneapolis then where did you go?

A. I came to Duluth.

Q. In the year 1893?

A. Yes.

Q. And have you been employed with the Street Railway Company ever since 1893 to the present time?

A. Yes, I have.

[fol. 137] Q. In what capacity, Mr. Warren, and over what period of years, in the various capacities?

A. I was acting General Manager when I came here, for three years.

Q. And then were appointed General Manager?

A. I became Vice President of the Company I think in 1909 or 1910.

Q. And I understand that you have been General Manager of the Duluth Street Railway Company in Duluth for a period of twenty years, from some time in 1893 to date?

A. It will be thirty years the second day of next September.

Q. And since 1910, or 1911, you have also been Vice President of the Company?

A. Yes.

Q. Mr. Warren, in your street railway operations in Duluth are you familiar with the books and accounts of the Company?

A. I am.

Q. Have you from time to time made estimates of what you think the future conditions will be?

A. I have.

Q. Have you caused to be prepared, Mr. Warren, certain exhibits showing the figures existing on the books of the Company?

A. I have.

Q. And in so far as you testify to exhibits in this case, purporting to show the condition of the books of the Company, are those figures true and correct?

A. They are.

Q. And you have also prepared and caused to be prepared, Mr. Warren, some exhibits, trying to stretch out over the future what you consider will happen?

A. I have made such exhibits, yes.

Q. And as to those exhibits, do they represent your opinion, based on the most accurate estimates that you have [fol. 138] been able to make, as to what those conditions will be?

A. They do.

Q. Referring to the complainant's Exhibit 4, page 1, did the Company, on July 1, 1921 own the property and easements therein stated?

A. We did own them.

Q. And does the Company own the property and easements therein stated, today?

A. It does.

Q. Referring to complainant's Exhibit 4, page 2, did the Company, on July 1, 1921, own the property therein stated?

A. It did, all of it.

Q. Does the Company own that property today?

A. It does.

Mr. Richards: That is objected to as immaterial for the reasons heretofore stated in the general objections made.

Mr. Carman: May the objections made at length be considered as going to all questions relative to the ownership of the property today, or of any date subsequent to the date of the valuation made by the Commission?

The Master: Objection overruled.

Exception by defendants and Intervenor.

Mr. Mitchell: I think the preliminary objection will cover that.

The Master: I have a note here. Objection as to any property acquired after the order, or the valuation on July 31, 1922.

Mr. Carman: It is not material what the Company owns today, as to whether it had that same property or not in 1921.

[fol. 139] Q. Referring to Exhibit 4, sheet 3, I will ask if the property therein stated, being Lots 21 and 22, Block 19, East Lawn Division, was purchased by the Company in the year 1923?

A. It was.

Q. Do you know about the time of the purchase, when it was?

A. I do, about the time.

Q. When was it?

A. It was in May or June of this year.

Q. Mr. Warren, does the Company own that property today?

A. Yes.

Q. And has owned it since the date of purchase?

A. It has.

Q. Mr. Warren, will you please state the amount of purchase price paid, together with the total amount of expenses of the Company in connection with the purchase of those two lots?

A. The purchase price of those two lots was $2,000, and together with all the expenses in connection with the acquisition of the lots, it was $2,082.

Mr. Carmichael: We now offer in evidence complainant's Exhibit 4, consisting of three sheets, 1 to 3.

The Master: It has already been offered in evidence, subject to the testimony of Mr. Warren. Do you want to offer it again?

Mr. Carmichael: No, we make the same offer.

Mr. Carman: We make the same objections.

The Master: It will be received subject to the objections.

Q. Mr. Warren, referring to complainant's Exhibit 5, will you please state what that is?

[fol. 140] A. Exhibit 5 is a statement showing the operating income of the Company at a straight six cent fare and returns allowed by the Commission. The first column of figures to the right of the dates shows the operating income from a full six cent fare by month, totaling, for the period of twelve months ending July 31, 1923, $314,972.92. The column to the extreme right shows a total of $345,000 which was the amount that was stated by the Railroad and Warehouse Commission to be the return it considered the Company entitled to, computed on its valuation of $4,599,978.22 at 7½%. While that was very much less than the value we are contending for, we have used it in this exhibit to compare with the actual income received and the total shows that the actual income was deficient, or under that amount allowed by the Commission, to the extent of $30,027.08, shown in red in the first column. I would say that the amount $345,000 is divided by month in proportion to the number of days in the month, a 31-day month consisting of 31/365ths of the total.

Mr. Carmichael: In connection with Mr. Warren's testimony, we offer complainant's Exhibit 5 in evidence.

Mr. Carman: Objected to as incompetent, irrelevant, immaterial, and not within the issues made by the pleadings in this actionk and upon the general grounds stated in our objection to the plaintiff going into questions or matters subsequent to the date when the Commission made the valuation and prescribed the rate involved in this action. [fol. 141] We particularly call attention to the fact that the various months' operating income stated here are the cost figures which have not been before the Commission, or at least not passed upon by the Commission, and are not authenticated as proper or reasonable in any way, so far as the Commission is concerned. They have never been *febore* the Commission at all, and were not considered by the Commission in any way, shape or manner, and we contend that they do not prove anything here against the Commission.

Mr. Richards: The City, in adopting the objection made by Mr. Carman, further objects to this exhibit for the lack of proper authentication and verification in the following

respects: It has not been shown, the underlying and preliminary facts which would sustain any of the figures in the first column, to wit: The witness has not stated whether this is a net income above operating expenses, or not. He has not shown whether he has followed the rule of depreciation established by the Commission, which cut the claim of the Company from $134,000 a year with no depreciation, to $115,000. And in no other respect is there any showing before this Master or the Court, as to operating expenses for August or September or any of the months, nor the net revenue as compared with those operating expenses, which would throw any light at all upon the situation before the Master, it would seem, until at least cross-examination had shown the detailed statement of operating expenses for each month.

Mr. Carmichael: You will ascetain that from Exhibit 11 which has been in your possession for some time.

[fol. 142] Mr. Mitchell: We can not offer everything at one time. I think when we get through, they will have all the detail they want, and we think it is proper to offer this first. It shows on its face what it is. It is the operating income.

Mr. Richards: Before it is received, certainly cross-examination should be allowed, to determine what has been omitted and what has been considered in rough-drafting Exhibit 5.

The Master: Of course, if you want to base a full objection, there is no question about that, Mr. Richards, because I am not actually excluding evidence. But further than that, are not these exhibits and tabulations submitted to the parties for examination, with the right to examine the original books if they desire?

Mr. Mitchell: Absolutely.

Mr. Richards: Well, we have not had any opportunity to do it yet.

The Master: Well of course you must have it.

Mr. Mitchell: The reason we have gone into this is to bring every possible angle of this into the exhibits and while the reports of the Company have been in the hands of the Commission,—all the information they have asked for—they have not had these exhibits until this morning.

The Master: Of course they should have them, but why not let these exhibits be identified, explaining the offer

made, and then you can take them, Mr. Richards, and make [fol. 143] such examination as you wish, with their books, and come back here and report, on whatever day it is fixed to adjourn to? Why not do that, without any hard and fast ruling at this time?

Mr. Richards: That is entirely satisfactory to us.

The Master: And if you want to cross-examine as to any of these exhibits, to enable you to make a full and complete examination during the period of adjournment, do that now, of course. That is, if there is anything that you want to find out about, to assist you in your analysis that you are going to make. Is that satisfactory?

Mr. Richards: I think it is. That is a good point. I am very well satisfied.

The Master: Well, they will be received with that understanding.

Mr. Richards: I might ask you in regard to this, pursuing the Master's suggestion. In this first column of complainant's Exhibit 5, headed "Operating income at a straight six-cent fare," for the month of August 1922, put at $29,306.11. Do you mean by that a net operating income for that month?

The Witness: I mean an operating income, as it is usually used in the classification of accounts. It is the operating revenue of the Company, less operating expenses and taxes.

Mr. Richards: I see.

The Witness: What remains after operating expenses and taxes.

[fol. 144] Mr. Mitchell: The amount which remains to pay dividends and the interest on the bonded debt?

The Witness: And all other purposes.

Mr. Carmichael: In other words, it is the amount available for return on the property?

The Witness: Yes.

Mr. Richards: Does that included anything about non-operating income?

The Witness: It does not.

Mr. Richards: Then, to determine that fact, we would have to determine what you have considered as operating expenses for that month?

The Witness: I don't quite understand you.

Mr. Richards: As a base for this calculation of $29,306.11, we would have to take into consideration what were

your figures for the operating expenses for that month of August?

The Witness: Yes, yes.

Mr. Richards: I will ask you now in drafting this in this form, did you follow the rule of depreciation set down by the Railroad and Warehouse Commission in its order of July 13, 1922?

The Witness: We did not. We have followed the same rule with regard to depreciation as we have followed for many years.

Mr. Richards: This represents your maximum claim, then, to make it concrete?

[fol. 145] The Witness: As to depreciation, it is the same basis as heretofore.

Mr. Richards: What you are claiming for the annual rate of depreciation here, as a base for this Exhibit 5 during this month, was it $134,000 such as you claimed before the Commission, or was it more?

The Witness: It would be affected only to the extent of the additional property, subject to depreciation. It would be computed by the same method.

Mr. Richards: Can you state, in terms, what amount of money annually you are figuring for depreciation?

The Witness: I cannot.

Mr. Richards: Was it $134,000?

The Witness: I cannot state that offhand, I have got it. I could get it very easily, but I would not want to state.

Mr. Richards: Or was it more than $134,000?

The Witness: I don't know without looking it up, just what it amounted to for the year.

Mr. Richards: Could you not say whether you had cut your claims for depreciation?

The Witness: I did say we have not. We have not changed the method of computation at all.

Mr. Richards: But you cannot say——

The Witness: The only change would be due to the changes in the amount of depreciable property. It is changing from time to time as we acquire new property, and it becomes subject to depreciation. It affects the amount [fol. 146] of depreciation, and that would be the only thing that would change it from the amount that we used.

Mr. Richards: The rate is the same?

The Witness: The rate is the same, the basis of computation.

Mr. Richards: And what rate did you use?

The Witness: We used a rate based upon 4% sinking-fund method, a rate taken from a Table of Lives. It was not a straight line rate.

Mr. Richards: In earlier years you claimed $121,000 for depreciation?

The Witness: It has changed from time to time, as I say, due to the change in the amount of property.

Mr. Mitchell, continuing:

Q. In this matter of depreciation, as I understand, the rate that you have used is the rate that has been used in connection with your federal income taxes, in determining net income?

A. Yes, in our income tax return we have used the same depreciation as set up here.

Q. And that rate has been received by the Wisconsin Commission in your report to that Commission?

A. Yes.

Q. And in these accounts, you have continued exactly the same methods which you used before, prior to the hearing before the Commission?

A. Yes, that is right.

Q. So that we are making the same contention here that we made before, the contention as to the rate of depreciation?

A. Yes.

[fol. 147] Mr. Mitchell: The Commission did not accept that. We do not understand here that we have to have the approval of the Commission before we can present our contention to this Court. We are really attacking the order of the Commission here.

The Master: Well, for a group of gentlemen that told me you had agreed on important matter! I am looking for those agreements.

Mr. Mitchell: We did not agree on the matter of depreciation.

Mr. Richards: I will ask you, if you, as a basis for this conclusion, included as operating expenses the Federal income tax?

The Witness: We did not include it in operating. We included it in taxes. It is deducted from this under the head of Taxes.

Mr. Richards: I think that will do for now. I may have some later examination after we have verified the accounts from the books.

The Master: Yes, Mr. Warren, will be here at any time Mr. Richards wants to ask any further questions?

The Witness: Yes.

Mr. Mitchell: Yes.

Mr. Richards: It is understood, however, that the offer of the exhibits will not be pressed at this time?

The Master: That will be just as you gentlemen prefer. They may be received subject to correction or subject to further objection.

[fol. 148] Mr. Mitchell: As we understand, we are offering these. It is our claim, of course,—they have access to our books for any examination desired and they *they* may develop in opposition to this position, anything that is possible, from their evidence.

Mr. Richards: I think it would be more logical, if Mr. Carman agrees, to reserve the actual offer until we have examined the books, until we can gather together all our specific objections, and state them at the time the exhibit is offered. We are not ready at this time, through lack of opportunity to examine the books, to fully set forth all the specific objections that we would have.

The Master: I think it does not make any difference which way you do it, except as a matter of recollection, remembering to finally offer the exhibits, because this is a tabulation, it is not evidence in itself, in any event. It is a tabulation and its correctness depends upon the examination that will be made with reference to the books. It is not original evidence. It is a mere tabulation. It is on their claim. If their claims are based on proper con--lusions or proper depreciation, that goes to the value. So it does no- make very much difference whether you offer it now, except as a matter of remembrance.

Mr. Mitchell: This is our evidence, and we are offering it as the compilations from the books.

The Master: If the objection is insisted upon and it is offered at this time as a tabulation, it seems to me it is not

supported by proper foundation. But I do not know that I have any right to reject it.

[fol. 149] Mr. Mitchell: Well, it will be assumed that we will be required to offer the original books themselves. I think it is not unusual for an expert, familiar with the records, to offer his compilations and testify as to accuracy, and offer those records.

The Master: After he produces the records, and substantiates the facts from which he makes his tabulations. But if you use the tabulations first, and we are ruling on the evidence finally, I should not think it would be proper. However, I think we are wasting time.

Mr. Richards: Mr. Carman and I seem to agree that there is no particular point which requires formal objection at this time.

The Master: Well, I will mark them, Received subject to the objection.

The cross-examination of the witness was further continued.

By Mr. Carman:

Q. I wanted to ask you, in that Exhibit 4: The list of lots included in the land valuations contains, does it not, Lots 422 to 432 in Block 47 Duluth Proper Second Division, which is the property used jointly by the Superior and Duluth Street Railway Companies?

A. The lot numbers you gave do not correspond with these lots. You speak of Lot 422, Block 47?

Q. This is part of Block 47? You have all of Block 47 valued at $44,150?

A. Yes.

[fol. 150] Q. Now, out of that, are those lots 422 to 432 in that Block used jointly by the two companies?

A. There are, in that block, perhaps two or three lots,—there is a part of the property in that block that is used to some extent by the Superior Division, being the general office building and the shops, not the car house but the shops building. What lots those are I do not know. It does not show the number here.

Q. Those are the lots which the Commission, in the order which is involved in this proceeding here, took into ac-

count and made deduction of $7,100 as the amount apportioned to the Superior end of the Company, are they not?

A. Those lots are included here.

The Master: How much did you say the Commission deducted?

Mr. Carman: I believe the amount the Commission deducted is not stated in the order.

The Master: Well you asked and he agreed,—did you not (To the witness)?

The Witness: I did not agree as to the amount. I intended to say only that the property described there did include several lots, and there is on some of these lots some property that is used by the Superior Division.

Mr. Mitchell: As I understand, the engineers agreed on the allowances to be made on account of the Superior use. I did not know there was any point about that.

The Master: Before you get away from Exhibit 4 with Mr. Warren, will you call his attention to that easement?

[fol. 151] Mr. Carmichael: We will do that at two o'clock.

The Master: Let us get that while we are on Exhibit 4.

(At this point a recess was taken until two o'clock P. M., the hearing then to proceed at the same place.)

[fol. 152] Afternoon Session

2 o'clock August 14, 1923.

Mr. Carmichael: Just after the noon recess, I conferred with counsel for the State, or for the Commission, and counsel for the City, and the valuation engineers for the State and for the City, and I think that we are in accord with this method of procedure, and which I think will save a lot of time. We suggest that we go ahead with Mr. Warren on these exhibits, and offer them, and that your Honor make your ruling, subject to their being corrected afterwards; then, when we finish that, and the testimony that we have tomorrow, the valuation engineers and the attorneys will take possible until next Monday or maybe later, to check these all over, and then take up the cross-examination of Mr. Warren at that time on the different exhibits that they want to go into, and in that way I think we can get a

logical story. I appreciate that some of these exhibits of Mr. Warren may be confusing, and that counsel may, with the best of intentions, ask a lot of questions, and might not have had time to state their exceptions, and that these might become less important later.

Mr. Carman: That is correct. In other words, it amounts to receiving them now subject to whatever objections may hereafter be made, after defendants' cross-examination.

Mr. Carmichael: And I understand that is agreeable to Mr. Richards.

Mr. Richards: It is.

Mr. Carmichael: That applies, except as to Exhibit 4, then?

Mr. Carman: Yes.

[fol. 153] Herbert Warren was thereupon recalled to the witness stand for further examination,

By Mr. Carmichael:

Q. Now, Mr. Warren, will you please describe in a general way, for the purposes of the record, what the inclined railway on Seventh Avenue West is, what the availability of the use of that ground is underneath that structure, for highway purposes? Give us a fairly complete description.

A. The inclined railway is, for the most part, an elevated railway built on an elevated structure, for the most part, on a grade of about 17%, and, as I stated this morning, I think the maximum grade is 28%. It runs up over the rocky cliff, not in the steepest place, but it rises about 500 feet from Superior, and the length of the line is 3,000 feet. From that we have computed that it would grade about 17%. The street was never improved, and if it were practical to improve it, cut out the rock and make a uniform grade, it would be too steep for any kind of vehicle to use. The elevated structure is steel, about 28 feet in width.

Q. At what height, Mr. Warren, is that steel structure, from the rock? There practically is no ground at that point, to form a surface?

A. Well, it varies from 20 feet to right close to the rock. In some places it is right on the rock, and in other places there are some streets that pass under it.

Q. Do I understand that in some places the structure is right down on the rock?

A. Yes.

Q. So there would be no room for traffic between the structure and the surface, at all?

A. No.

[fol. 154] By Mr. Richards:

Q. What is the width of that avenue, as platted?

A. Well, as platted, I think it is 66 feet, Mr. Richards. That is the width of the other avenue there.

The Master: Have you the area computed?

The Witness: It would be 28 feet by 3,000 approximately; that is on the incline; about 2,960 feet at the base, —about 84,000 square feet.

(The engineer, Mr. Gifford, stated that it was 1.93 acres.)

By Mr. Carmichael:

Q. Calling your attention to plaintiff's exhibit 6, will you please describe what that is?

A. Exhibit 6 is a statement showing operating income of the company at a straight six-cent fare, the return allowed by the Commission for the twelve months ending July 31, 1923. It give- practically the same information as Exhibit 5, except that it is arranged in lines horizontally, and shows the result of a comparison with the $345,000 allowance of the Commission, by months. It shows that in the month of August, 1922 the operating income of the company was $4.74 in excess of that allowance; that from September to November, inclusive, it was $466.10, $2,440.48, and $1,088.42, respectively, under that allowance of $345,000. In December 1922 it was $1,893.34 in excess of that allowance. In January 1923, $3,881.28 deficient. In February, $51,301.03 deficient. In March 1923, $182.06 in excess. In April, May and June, and in July as estimated——

[fol. 155] Q. July being the only month estimated?

A. July is the only month estimated—the deficiency was as follows: $5,110.35; $7,972.43; $1,490.20; $4,527.93. And the deficiency for the twelve months was $30,027.08, the same as shown in the exhibit.

Q. During the whole twelve-month period from August, 1922, to and including July 1923, the six-cent fare was

charged and collected, in accordance with the order which granted a temporary injunction in this case?

A. It was. This statement, however, is computed on the full, straight six-cent fare.

Q. Yes. And the $345,000 item, being the total at the end of the second horizontal line of figures, is the return which the Commission found that the Company was entitled to receive, based on the Commission's valuation, and the Commission's rate of return.

A. Yes.

Q. Calling your attention to Complainant's exhibit 7, will you please explain what that is, Mr. Warren?

A. Exhibit 7 is a statement showing the operating income of the Company at a straight six-cent fare, as compared with the allowance of the Commission of $345,000 per year from August 1, to July 31, 1923, with the month of July estimated. The first column shows the operating income of the company at a straight six-cent fare, amounting to $314,972.92, the same as in the previous exhibits The third column shows the return allowed by the Commission, being 7½ per cent on the Commission's valuation as of July 31, 1921, of $4,599,978.22, with net additions to property between December 31, 1921, as shown by exhibit [fol. 156] 23, later to be referred to, and added—Beginning with July 1, 1922,—I don't know as I gave that amount; the amount of those property additions during the year 1922 were $153,435.38. Then there is added also the estimated net additions amounting to $105,302, as will be shown by Exhibits 24 and 25, during the year 1923 added, beginning with July 1, 1923. On the Commission's valuation of $345,000 for the year, with those additions, it makes a total of $357,176.55. That is subdivided into months in the same manner as in the previous exhibits, in accordance with the days in each particular month. The first column shows, under the $314,972.92, the total operating income for the period, in red, marked "deficiency," $42,302.63, being the difference between the allowance of the Commission with the additions as stated, and the operating income of the company for that period.

Q. Then do I understand this, Mr. Warren, that, based on a straight six-cent fare being in effect from August 1922 to and including July 1923, that the operating income of the Company was $42,302.63 less than the return which

the Commission found that the Company should receive, based on the Commission's valuation, plus the property in addition, subject to the valuation of the Commission to and including the last day of this year?

A. It is a correct understanding; that is exactly it.

Q. Mr. Warren, in speaking of these exhibits, you use the words "operating income of the Company." Is that accurate? Don't all these exhibits represent only operating income of the Duluth division of the Company?

[fol. 157] A. That is true. It is not quite accurate, to say "operating income of the Company." It is the operating income of the Duluth division.

Q. Calling attention to complainant's Exhibit 8, will you please tell us what that Exhibit is?

Mr. Carmichael: Before I put that question—I will make a formal offer of complainant's exhibit 6 and 7.

The Master: They will be received, subject to correction and objection.

Mr. Richards: Did you allow any depreciation on those two items, annually, of $153,435.38, actual additions, and the estimated addition $105,302?

The Witness: There is certainly none on the estimated additions. There would be, in the operation of our method, some depreciation, computed on the additions, beginning with the first of the following year.

Mr. Richards: Well, did you allow them in this column here,—depreciation on the $153,435.38?

The Witness: You are looking at Exhibit 7?

Mr. Richards: Yes.

The Witness: I do not find the amount that you read there. Oh, yes, this $153,435.38. As I stated, I presume there may have been some depreciation computed on those additions.

Mr. Richards: My question was, did you allow it in your estimate, in this column, in the second column?

The Witness: There is no estimate except for the month [fol. 158] of July. It is actual figures. Oh, I see. You mean you are referring to the estimated additions for 1923?

Mr. Richards: No. You divide your addition into actual for one period, and estimated for another?

The Witness: Yes.

Mr. Richards: I am calling your attention to the first statement of net additions, actual, $153,435.38, stated in this exhibit at the head of the second column of figures.

The Witness: Yes.

Mr. Richards: Now, I am asking you there: Did you, in making your lower estimates by months, of the return allowed by the Commission, take into consideration, and figure any depreciation on the actual additions to the property between December 31, 1921 and January 1, 1923—stated to be $153,435.38?

The Witness: No, we did not.

Mr. Carmichael, continuing:

Q. Referring to complainant's Exhibit 8, will you please describe this, Mr. Warren?

A. Exhibit 8 is a statement showing the operating income of the Duluth Division of the Company at a straight six-cent fare, as compared with the return allowed by the Commission from August 1, 1922 to July 31, 1923, the month of July being estimated. It shows some of the same figures as shown on Exhibit 7, except that it is arranged in horizontal lines instead of in columns, and shows the results separately, by months. It shows, for the months of August, September, October and November 1922 deficiencies of $972.48; $1,411.80; $3,417.70; and $2,034.12, respect-[fol. 159] ively. For the month of December 1922, it shows $916.12 operating income in excess of the Commission's allowance. In all the remaining months of this 12-months' period, from January to July, inclusive, it shows deficiencies as follows: January, $4,858.50; February, $6,012.67; March, $795.16; April $6,056.05; May $8,949.65; June, $2,435.90; July, $6,175.72; and a deficiency for the year of $42,203.63, the same as shown on Exhibit 7.

Mr. Carmichael: We will offer Complainant's Exhibit 8 in evidence.

The Master: It will be received, subject to objections and corrections.

Q. Calling your attention to complainant's Exhibit 9, will you please state what that is?

A. Exhibit 9 is a statement showing the operating income of the Duluth division of the Company for the year

1921 at the five-cent fare then in effect. It is made in accordance with the classification of accounts prescribed by the Interstate Commerce Commission, which is also substantially the same as the classification which has been adopted by the Minnesota Commission and the Wisconsin Commission; and also it is the classification of the American Electric Railway Association, which we have followed. It shows by months the operating income and the items which make up that income, consisting of Passenger Revenue as one item; Chartered Cars revenue as another item; Mail revenue, and Miscellaneous Transportation revenue, and then a total revenue from transportation for the year of $1,371,459.72. Then it shows the revenue from other [fol. 160] railway operations divided into five subdivisions consisting of Station and Car Privileges, Rental of Equipment, Rental of Buildings and other property, Power, and Miscellaneous, amounting for the year to $11,867.55, making a total operating revenue of $1,383,336.25. It then shows the next item, Railway Operating Revenues, subdivided into seven (7) divisions consisting of Way and structures, Equipment, Power, Conducting Transportation, Traffic, General Miscellaneous, and Transportation for Investment, which is a credit. The total operating expense for the year is $1,116,215.56. That, deducted from the Railway Operating Revenue, leaves the net revenue from the railroad operation at $267,120.69. From that is deducted taxes asignable to railway operations amounting to $81,-260.39, leaving an operating income of $185,860.30.

Mr. Carmichael: Now we offer plaintiff's Exhibit 9.

The Master: Received, subject to objection and corrections.

Q. Do I understand you to say, Mr. Warren, that these accounts are made by the method prescribed and ordered by the Interstate Commerce Commission?

A. Yes.

Q. And that later that method was adopted by the Minnesota Railroad and Warehouse Commission?

A. Yes.

Q. And by the Wisconsin Commission?

A. Yes.

Q. And by the American Electric Railway Association?

A. Yes.

Mr. Gifford: You do not mean that they have approved your accounting methods?

The Witness: No.

[fol. 161] Q. Calling your attention to plaintiff's Exhibit 10, may I inquire if the lower tabulation on plaintiff's exhibit 10 is the same as the tabulation on complainant's exhibit 9?

A. It is identically the same in every respect.

Q. Now, the upper tabulation on the exhibit, will please explain what that is?

A. The entire statement is a statement showing the operating income of the Duluth division of the Company from January 1 to July 31, inclusive, and in each of the years 1921 and 1922 set out for comparison. The five-cent fare was in effect during both years.

Q. That is, the seventh-months period in each of the two years?

A. Yes. It was in effect during the first seven months during those years, and those first seven months are bracketed together, being under the five-cent fare; the last five months in each year are also bracketed together. Those months in 1921 being at the five-cent fare, and in 1922 at the six-cent fare from August 1st to September 7th, then at a six-cent fare with five (5) tickets and one conditional rebate coupon for 30 cents from Setpember 8th to December 31st, inclusive. This statement is made in such a way as to show the coupons sold in the period, aggregating $25,727.41, and not included in the Passanger Revenue, and that amount, $25,727.41, less 12½ per cent, or one-eighth, would be reflected in the operating income,—the one-eighth being federal income tax.

Q. So, to give full effect to the six-cent fare, with the result shown here, in 1922. we should add to the figure $222,376.76, a sum equivalent to seven-eighths of $25,727.41?

[fol. 162] A. I do not get the amount that you gave, but that is what should be added,—seven-eighths of that $25,000. ($25,727.41).

Q. And you would add that to the total under the year 1922, your total being $222,306.76?

A. Yes.

The Master: The effect of deducting the $25,727.41 from 1922, is to leave the whole year at flat five cents, is it not?

Mr. Mitchell: No. That is only the coupons. They did not all buy coupons.

Mr. Carmichael: Plaintiff's Exhibit 10 offered in evidence.

The Master: It will be received, subject to objection and corrections.

Q. Calling your attention to Exhibit 11, will you please explain what that exhibit sets forth?

A. Exhibit 11 shos the operating income, by months, of the Duluth division of the Company for the twelve (12) months ending July 31, 1922, at the five-cent fare then in effect, compared with the twelve months ending July 31, 1922 (July estimated), at a straight *seic-vent* fare. It was made by months and in accordance with the same classification of accounts as referred to before, and shows an operating income for the twelve (12) months ending July 31, 1922, at the five-cent fare, of $174,215.34.

Q. That is, the 12-month period ending July 31, 1922, is at the five-cent fare which was in effect during the whole of that period?

A. That is right.

[fol. 163] Q. And showed the result of an operating income of $174,215.34?

A. That is right. And compared with that, in the lower part of the statement, it shows the same kind of a statement of operating income by months for the year ending July 31, 1923,—July being estimated,—and shows an operating income for that period, at the full six-cent fare, of $314,972.92.

Q. In arriving at the figure for the period ending July 31, 1923, of operating income of $314,972.92, that is figured at a straight six-cent fare?

A. Yes.

Q. Without any deduction at all being made by reason of any coupons sold?

A. Yes, that is correct.

Q. That is the result of the figure that you would have arrived at, had no coupons ever been sold at all?

A. That is true.

Q. Now, to digress for a moment, Mr. Warren, and check back. I will ask you if in your Exhibit 11 is shown the detail of how the figure $314,972.92 is arrived at, as used in Complainant's Exhibits 5, 6, 7, and 8?

A. The lower part of this Exhibit 11 shows the operating income by months for the same period as that covered by Exhibits 5, 6, 7, and 8, amounting to $314,972.92 for the entire period.

Mr. Mitchell: Exhibits 5 and 7, and the lower half of 11 show the entire history of the operation through this year, which was practically a test year?

The Witness: They do.

Mr. Mitchell: And the lower half of 11 is the detail of the other two statements?

The Witness: A detail *fo* the same figures shown in the other exhibits.

[fol. 164] Mr. Mitchell: Whatever value these have, is for comparative purposes. These three exhibits are really what have the controlling effect. They tell the story.

Q. Calling your attention to plaintiff's Exhibit 12, will you please state what that is?

A. Exhibit 12 is an estimate of the operating income from July 1st to December 31st, 1923 inclusive, on the basis of a straight six-cent cash fare. It is made up in accordance with the classification of accounts, the same as the other exhibits, and shows a result as follows: Passenger Revenue——

Q. I think it will be sufficient if you state the operating income as estimated for the last six months of 1923.

A. The operating income estimated there is $114,465.22.

Q. Do I understand that you do not have the complete accounts available for July, 1923, and that it is necessary at this stage to estimate?

A. That is true. We will not have those for some time.

Mr. Carmichael: We offer Complainant's Exhibit 12, and also Exhibit 11.

The Master: Both will be received, subject to corrections and objections.

Q. Calling your attention to Exhibit 13, will you please state what that is, Mr. Warren?

A. Exhibit 13 is a statement showing an estimate of the operating income of the Duluth division of the Company for the year 1924 on the basis of a straight six-cent fare, and shows the operating income for the year as $247,957.12. [fol. 165] Mr. Carmichael: We offer complainant's Exhibit 13.

Mr. Carman: I wish to state that on Exhibit 13—we want to emplify the objection made heretofore, so that the record may be complete; and I want to do it at this time as to Exhibit 13, because it goes beyond the time in question, and takes in the year 1924. The exhibit is objected to upon the grounds, first, that it is too speculative, conjectural and uncertain to have any probative force or effect as evidence. Second, upon the grounds that it is incompetent, irrelevant and immaterial in this action. And third, upon the ground that Chapter 278 Session Laws of Minnesota for 1921, known as the Brooks-Coleman Act, is the provision to which the plaintiff has consented, and under which the Commission acts, and that provides for rehearings and readjustments in rates as often as changing conditions require, and as often as the Commission sees fit, either upon its own motion, or upon the request of any party in interest. And it does not appear, and cannot be made to appear and assumed that the Commission has failed to perform its duties in the year 1924, or at any such future time; and for this Court to undertake now to prescribe in advance what the Commission shall do in the year 1924, is to usurp the power and assume the duties of the Commission as a rate-making body, in the face of the repeated declarations of the Supreme Court of the United States that no federal court may so act; and that neither the rates prescribed for the plaintiff in 1924, nor at any other time, with reference to controlling plaintiffs acts and operations in 1924, is within the issues made by the pleadings in this action. I will state further, in amplification of [fol. 166] this objection, and as a further cause for objection, in addition to those already stated, that, in our opinion, the only federal question involved in this case—if it be assumed—without conceding that there is a federal question involved,—is the question of the rates prescribed by the Railroad Commission in its order of July 13, 1922

against which this injunction proceeding is directed as confiscatory or which would be confiscatory during the time between which the order was to go into effect, and the time when an examination, amplication and revaluation could be made upon appear- from the order to the proper District Court of the State of Minnesota, as perscribed by the Brooks-Coleman Act. This is an objection based upon the theory that the Brooks-Coleman Act provides in effect for a dual system of valuation; that it confers that power upon the Railroad and Warehouse Commission in the first instance to make a valuation on plaintiff's property and prescribe a rate of charges for the public services rendered by plaintiff. That, in the second place, it provides for a revaluation and re-making of rates by a special court of three district judges, upon review and appeal from the findings of the Commission. In this case, we contend that this injunction, which was a proper injunction in this case, was procured, and this case was started when the process of making a final valuation for the rates prescribed by the Commission was only half complete; and that because of the fact that the only question of confiscation which this court might consider, if any, would be, in our view of the case, a question of whether confiscation would occur between the time the order went into effect and the time the District Court of the State could make a revaluation and [fol. 167] modify that; that therefore any evidence concerning the operations of the Company so far away as the year of 1924, is clearly and entirely beyond reason, and outside of the sphere in which it could have any effect or any probative force in any way upon any issue in this case.

Mr. Richards: The City makes the same objections.

The Master: Is this only an emergency order?

Mr. Mitchell: No. It is for final determination, and this order is a continuing order and remains in effect until set aside either by the Commission itself, or by some court having jurisdiction,—and this is a court of equity, and we are invoking equitable jurisdiction, and we are merely, by these estimates as to the future, specifi*c*ying whatever equitable consideration is required, to show that this rate, which was confiscatory when made, and which has been confiscatory up to date, will continue to be confiscatory in the future.

The Master: As I have said, I do not understand that the Master is clothed with authority to reject evidence unless it is so foreign to the issue that it might be classed as scandalous. If we should come to a deadlock on the admission of evidence, I think the proper thing would be to apply to the Court for instructions. My duties are confined to the determining of facts, making computations, and recommending a decree, in the first instance. Many of these questions are very interesting questions, such as those just raised by Mr. Carman, but they are matters not for me to decide at all. The proper extent to which this case may go, the jurisdiction of the federal court, the effect of Chapter 278 Laws of 1921 upon the case as it appears, I think are all [fol. 168] matters for the Court to determine under the facts as found. So, unless there is some reason which some of you gentlemen may have, why I should express my opinion as to the competency and propriety of the evidence, I do not think I will do so*l*.

Mr. Mitchell: We have understood from the beginning that that was your Honor's view of the duties and powers of the Master, and that is our own. We, on our side, have assumed that your Honor did not care for arguments upon this point. The fact is, that a great many of the points suggested by counsel have, in his absence on vacation, been determined either by Judge Booth or by the three Judges in granting a temporary injunction. But we have not interfered, and have assumed that their desire is merely to make the record more complete, as to their objections.

The Master: I understand in some instances that the Master has sustained objections to evidence, although the evidence was actually given, and that that was done for the purpose of informing the Court as to what evidence the Master considered in coming to his conclusion.

Mr. Mitchell: I think that has been done. However, I think the practice your Honor has suggest- is the better practice.

The Master: I am perfectly willing to follow the course, on that point, which is most agreeable to counsel, so that when it comes to taking exceptions, and arguing the case before the Court, you may have the record as plain as possible.

Mr. Carman: The whole object here in stating these objections at this time is to make our record clear.

[fol. 169] The Master: I have no objection to indicating my view that, while evidence of this sort is very much open to the charge of being speculative, and no one can tell what operating expenses will be, and matter of that sort,—still, it may be of some value as showing whether, as a practical question, this is a real confiscation or merely temporary. It must be admitted that *n*obody whom we know can foretell what is going to happen a year or so from now.

The Exhibit will be received, subject to the objections, and corrections.

Mr. Carman: Exception.

Mr. Carmichael: Relative to Complainant's Exhibit 14, I wish to make this statement: It consists of five (5) sheets, and is prepared to show the effect which would have been given by the Commission in finding values, to have given some allowance for present-day costs, in accordance with three cases to which we will call your Honor's attention,—being known as the Galveston case, the Southwestern Bell Telephone case, and the Minneapolis Gas case. We are going to offer this exhibit, and ask the privilege of withdrawing it later if we so desire and offering another exhibit in its place after Mr. Drum, on his arrival next Monday, has had the opportunity to check it over. Mr. Mitchell and I have not had the opportunity for checking it with Mr. Drum. I understand that it is also very likely that the valuation engineer for the State, the valuation engineer for the City and the valuation engineer for the Company will also check this over together, to see if they cannot arrive at a basis in which they would all be in accord in the application of the principle announced in those three cases.

[fol. 170] An examination of that exhibit we will forego until Mr. Drum arrives.

Relating to Exhibit 14-A, I would like to make this statement: Exhibit 14-A is a tabulation for which Exhibit 14 forms the basis, and if ultimately it should be determined that we are to substitute a different exhibit for Exhibit 14, it will be necessary to substitute another exhibit for 14-A, and for that reason we will not go into Exhibit 14-A at

this time, but will submit it (as we have) to counsel on the other side, and to Your Honor, for your information.

Mr. Mitchell: Our suggestion is that for the present these two exhibits be offered, with the understanding that we may withdraw them later and substitute others, and testimony supporting the two exhibits will be given after Mr. Drum's arrival.

Mr. Carmichael, continuing:

Q. Complainant's Exhibit 15, Mr. Warren, will you please explain what that is?

A. Exhibit 15 shows the Revenue Passengers carried, by months, during the year 1921, on the Duluth division of the Company, and shows a total for the year of $27,246,916.

Mr. Carmichael: We offer Complainant's Exhibit 15 in evidence.

The Master: Received, subject to correction and objection.

Q. Will you please explain what Complainant's Exhibit 16 is?

A. Exhibit 16 is a statement showing the revenue passengers carried from January 1 to July 31, inclusive, for the years 1921 and 1922, the two years being compared, and [fol. 171] both periods being at the five-cent fare for seven months of each year.

Q. And with the first seven months in the two years compared?

A. Yes. In the seven months of 1921 there were carried 16,376,333 revenue passengers; in the corresponding months of 1922 there were 15,255,691, a decrease in every one of the seven months varying from 107,678 in July to 220,730 in February. The percentage of decrease during the period was 6.843.

Q. That is, there were fewer passengers carried the first seven months in 1922, as compared with the first seven months in 1923 in the amount of 6.843 per cent?

A. That is right.

Q. Both periods were under the five-cent fare?

A. Yes, the same.

Mr. Carmichael: We offer in evidence complainant's Exhibit 16.

The Master: It will be received subject to corrections and objection.

Q. Will you explain to us, Mr. Warren, what complainant's Exhibit 17 is?

A. Exhibit 17 is a table showing revenue passengers carried on the Duluth division of the Company from August 1 to December 31, inclusive, during 1921 and 1922, the two five months periods being compared. During 1921, in the five months from August to December inclusive, it was a five-cent fare. And during 1922 it is shown, in comparison, that there was a six-cent fare in effect, or the present rate of fare, six cents with rebate coupon. This statement shows the revenue passengers, by month. For the month of August there was a decrease of 212,057 passengers in [fol. 172] 1922, as compared with 1921, being a decrease of 9.492 per cent. In the month of September there was a decrease of 64,671, the percentage of decrease being 3.208. In October the decrease was 125,131, a decrease of 5.850 per cent. For the month of November the decrease was 127,417, being 5.945 per cent; for the month of December there was a decrease of 24,811, being 1.061 per cent. A total decrease for the five months' period of 1922, as compared with 1921, of 554,087 passengers being 5.097 per cent decrease.

Q. During the last five months of 1921 was the five-cent fare in effect?

A. Yes.

Q. And during the last five months of 1922 was the six-cent fare in effect?

A. Yes.

A. And the decrease in the last five months of 1922, as compared with the last five months of 1921 was 5.097 per cent?

A. Yes.

Q. Well, for the first seven months of 1922, compared with the first seven months of 1921, during both of which periods the five-cent fare was in effect, the decrease was greater, being 6.843 per cent. Is that accurate?

A. That is correct.

Mr. Carmichael: We offer in evidence Exhibit 17.

The Master: It will be received subject to correction and objections.

Q. Will you please state what Exhibit 18 is.

A. Exhibit 18 is a statement showing the revenue passengers carried on the Duluth division of the company from January 1 to June 30, inclusive during the years of 1922 and 1923, the two years being compared by parallel columns.

[fol. 173] Q. Just at that point, will you include what rate was in effect in each of these periods?

A. Five-cent fare was in effect during those months of 1922, and six-cent fare, with the conditional rebate coupon, during those months in 1923.

Q. Now continue, please.

A. The passengers for each of those months are shown separately in parallel columns, and the increase or decrease is shown both in number of passengers and in percentage. For January there was an increase of 10,407 passengers, being an increase of .460 per cent. In February, the increase was 87,015 passengers, or an increase of 4.435 per cent. In March there was an increase of 19,134 passengers, the increase being .821 per cent. In April there was a decrease of 14,202 passengers, the decrease amounting to 2.004 per cent. In May there was a decrease of 68,280 passengers, the decrease amounting to 3.149 per cent. In June the decrease was 54,916 passengers, or 2.603 per cent. There was a net decrease in the six months of 1923, as compared with that period in 1922, of 50,842 passengers, being a decrease in percentage of .391.

Mr. Carmichael: We offer complainant's Exhibit 18.

The Master: Received, subject to objections and corrections.

The Witness: There is a note that I did not read.

Q. Do you have any explanation for the increase in passengers in the first three months of 1923, as compared with the first three months of 1922?

A. Yes, I have. In 1922 there was unusual weather conditions during February and March, particularly in Febru-

[fol. 174] ary, and the service was interrupted materially in February, 1922, and the passengers carried were far

below the normal. That would account for the comparatively larger number in 1923.

Q. In February 1922, was there a heavy snowstorm here?

A. Very heavy.

Q. Possibly the heaviest in the history of our Bureau?

A. Yes, there was suspension of service for a day or two, no passengers carried at all.

Exhibit 18 offered and received in evidence subject to corrections and objection.

Q. Plaintiff's Exhibit 19, what is that?

A. Exhibit 19 is an estimate by months of the number of revenue passengers to be carried by the Duluth division of the company from July 1 to December 31, 1923, inclusive. However, the month of July shows the actual figures, that having been ascertained. The statement shows, during the six months period 12,369,759.

Exhibit 19 offered and received in evidence subject to corrections and objection.

Q. Will you please explain Exhibit 20?

A. Exhibit 20 shows an estimate, by months, of the number of revenue passengers to be carried on the Duluth division of the Company in 1924, with a six-cent fare in effect.

Q. And what is the total, as you have estimated, Mr. Warren?

A. The total number is 25,220,000.

Q. In taking the number of passengers at various rates [fol. 175] of fare, what rate of fare have you taken as the base rate, and at what the riding habit would be, say 100 per cent, for a basis of comparison on rate of fare?

A. The five-cent fare, formerly in effect, was taken as 100 per cent.

Q. Well, have you taken, as we will show in plaintiff's Exhibit 14-A, the Commission's rate of fare of six cents cash, and five rides for a quarter, as a base, or 100 per cent?

A. We considered that would be exactly the same as five cents, so far as the riding habit was concerned.

Q. For the next three or four questions, Mr. Warren may not be the exact witness, but the exact witness, from

Columbus, Ohio, will be here tomorrow morning, and with the understanding that Mr. Warren's testimony in this will be supplemented, I will ask a few more questions on this line: What percentage of passengers, at the Commission's rate of fare,—that is six cents cash, five for a quarter, have you figured would pay the six cents cash fare?

A. 7.4, or 7.6.

Q. And the resulting percentage is 92.4% which you figure would ride at five rides for a quarter?

A. Yes, that is correct.

Q. Now, you have averaged the ride at the six-cent fare, with five rides for 25 cents, or under the Commission rate, but that is what the average rate of fare would be?

A. Yes.

Q. What is that figure?

A. Their average fare would be 5.076.

Q. You have use- that figure at 100 per cent?

A. Yes.

Q. 5.076 cents per passenger, that is what the Company would receive, according to your estimate, at the Commission's rate of fare?

A. Yes.

[fol. 176] The Master: And you applied that to the number of passengers that you estimate?

The Witness: Yes.

Q. Now, we are still on Exhibit 20, and you have computed that at a six-cent fare, in effect, computing the estimated number of passengers in 1924. What, if any, percentage have you allowed for decrease in passengers, due to the increased fare from 5.076 per passenger, to 6 cents per passenger?

A. I have assumed there would be a decrease by reason of the increase from 5¢ to 6¢, or the increase from the Commission's rate of fare to 6¢,—a decrease of 4%. That at six cents there would be 4% less than at 5, or at 6¢ with five for a quarter.

Mr. Carmichael: With that explanation, we offer complainant's Exhibit 20.

The Master: I would like to ask, Does he mean that 25,220,000 passengers on Exhibit 20 represents 96% of

your estimate of what passengers would be, if there was no increase in the fare?

The Witness: Exactly.

Mr. Carmichael: That is, if the Commission's rate of fare was applicable.

Mr. Richards: Do I understand you to mean that in your estimate of 1924 in exhibit 20, of 25,220,000, that that represents 96% of the number of revenue passengers that would ride under the Commissioner's order?

The Witness: Yes, that is exactly it.

Mr. Mitchell: 14-A has all that. Look at it, Mr. Richards.

[fol. 177] The Master: It seems to me we are getting confused.

Mr. Carmichael: Mr. Warren, will you turn to your estimate 14-A for a moment?

The Master: I understand your explanation thoroughly, but I do not see why this Exhibit 20 should go into the question as to how many would pay 6¢ and how many would pay five for a quarter on a Commission's order.

Mr. Carmichael: That is true. It has to do with what we expected to go into on Exhibit 4, and then we thought we should pass that. I agree with the Master that it is not relevant as to Exhibit 20. With that, I will offer Exhibit 20 in evidence.

The Master: Received, subject to objection and corrections.

The Witness: I might clear matters up a little. That 25,220,000 at 6¢ fare, was made first and is shown in detail, and the number that would have ridden at the Commission's rate of fare was projected from that. The estimate was really made on the 25,220,000, based on the same fare we now have. In order to show how many would have ridden on the Commission's rate of fare, we show the other column which is 100%—this being 96%.

Q. Please explain Exhibit 21.

A. Exhibit 21 is an estimate by months of the number of revenue passengers to be carried on the Duluth division of the company, in 1924, on 7¢ cash fare, four rides to be sold for 25¢, and shows a total number of revenue passengers for the year of 24,694,583. And in that the estimate is

94% of the number that would be carried, with the 5¢ rate of fare of the Commission applied.

[fol. 178] Mr. Richards: Did you take the sixty——

The Witness: As a matter of fact, I took the sixty, and went back to the 40% for one column, and the other was for the other columns.

Mr. Richards: Exhibits 20 and 21—there is a difference of two per cent?

The Witness: Yes.

Mr. Carmichael, continuing:

Q. Seven cents cash and four for a quarter would mean what average fare, according to your experience?

A. 6.4¢. That is based on the assumption that 80% of the passengers would be ticket passengers, or four rides for a quarter.

Mr. Carmichael: We offer Exhibit 21 in evidence.

The Master: Received, subject to objection and corrections.

Q. Exhibit 22 is what, Mr. Warren?

Q. Exhibit 22 is an estimate by months of the number of revenue passengers which would be carried on the Duluth division of the company in 1924 for the seven cents cash fare. It is based on two per cent less than the seven-cent fare (cash) with four tickets for 25¢, or at 92%, as compared with 100% for the five-cent rate, or the Commission's rate. It shows a total revenue of $24,169,166.

Exhibit 22 offered and received in evidence, subject to objection and corrections.

Q. Will you please state what Exhibit 23 is?

A. Exhibit 23 is a statement showing cost of the additions to the property value of the company, by months, from January 1 to December 31, 1922, and shows such additions [fol. 179] in subdivisions of: Land, Track and Roadway, Distribution System, Conduit, Buildings, Equipment, Rolling Stock, Power, Furniture and Fixtures. It shows a total for the year of $153,435.38.

Q. That is, net additions during the calendar year of $1922?

A. Yes.

Mr. Carmichael: We will offer the Exhibit 23 in evidence.

The Master: This is one that is subject to your objection, Mr. Carman.

Mr. Carman: Yes, this is subject to objection,—to the objections already stated as going to all evidence not as of the time of the valuation of the Commission.

The Master: Received, subject to the objections, and corrections.

Mr. Carmichael: Concerning Exhibit 24, I wish to make a statement, that it has been checked by the valuation engineer of the city, and that their check agrees with this exhibit as to accuracy. Will you state what it is?

A. Exhibit 24 is a statement showing Net Additions, by months to property value from January 1st to June 30, 1923 of the Duluth division of the Company; it is made by months, and subdivided the same as Exhibit 23. It shows that for the six months ending June 30, 1923, the cost of such additions was $36,518.59.

Exhibit 24 offered and received subject to corrections and objection.

Mr. Richards: You say "Net Additions." What do you mean by that?

The Witness: The reason that expression is used is because in our accounting sometimes we have credits or [fol. 180] sometimes there are properties disposed of, but these are net additions. Those are taken out.

Mr. Mitchell: On Exhibit 23 there are some of those credits.

Mr. Richards: Referring both to Exhibit 23 and Exhibit 24, I would like to ask if this had reference to some of the improvement on Superior Street and Second Street this last year,—1922?

The Witness: In 1922 it includes some of that, yes.

Mr. Carmichael: Weren't those renewals?

The Witness: Partially. Only the part that was betterments or improvements, or added to the value, was included in this statement. This does not show the total cost of such jobs, but only the part which consisted of an increase to the value of the property.

Q. That is, I would assume that, as far as renewals are concerned, that would show on your depreciation reserve?

A. That would. That has all been eliminated. This is only the net additional value.

Q. The matter of improvements and renewals is handled in accordance with the uniform classification of accounts as prescribed by the Interstate Commerce Commission?

A. It is.

Exhibit 24 offered and received in evidence, subject to corrections and objections.

Q. What is Exhibit 25?

A. Exhibit 25 is an estimate of the capital requirements of the Duluth division of the Company, beginning with July 1, June 30, to December 31, 1923, and shows capital requirements for the period estimated at $68,784.41.

[fol. 181] Q. Is that the most accurate figure that you are able at the present time to make concerning what you estimate the capital requirements will be during the latter six months of this present year of 1923?

A. It is my best judgment as to the amount that will be required.

Q. And you believe that amount will be required and expendable, in capital requirement?

A. Yes, I do.

Exhibit 25 offered and received in evidence, subject to corrections and objections.

Q. Exhibit 26, what is that?

A. Exhibit 26 is a statement of the material and supplies on hand as of June 30, 1923, showing that there was apportioned to the Duluth division, of such supplies, at that date, $105,501.06. That is in accordance with our accounts.

Mr. Mitchell: For the information of the Master, that item is covered by the engineers in their reports, as to July 1, 1921.

Mr. Carmichael: One of the purposes of this exhibit, in addition to proving the items, was to call your attention to what the engineers agreed on in 1921, and what the Commission found it to be at that time—$105,000 for materials and supplies, and showing that we have the same amount on hand now, applicable to the Duluth division. We offer

complainant's Exhibit 26 in evidence, only so far as it is applicable to the Duluth division.

Mr. Richards: It should be all offered.

[fol. 182] Mr. Richards: Very well. We offer all of Exhibit 26.

The Master: It will be received, subject to objection and corrections.

Q. Mr. Warren, will you please explain what complainant's Exhibit 27 is?

A. Exhibit 27 gives an estimate of the capital requirements of the Duluth division of the company during the year 1924, and shows the following estimated requirements: Extending Kenwood Avenue line to St. Marie Street, $60,000.

Mr. Mitchell: Is that plain to the Master,—the status of that?

The Witness: That line was ordered by the City Council and there is an agreement now between the Company and the Council that it shall be built and in operation by the 1st of August, 1924.

Mr. Mitchell: Did the City ask for larger expenditure than that for next year?

The Witness: The City has ordered more extensions than that.

Mr. Mitchell: Was this agreement under which this extension was to be made really a compromise,—some concession?

The Witness: Yes, it was.

Mr. Mitchell: Merely to show that there is nothing unnecessary.

The Master: This is not offered, except for the purpose of showing that unless the Company is financially able to make these additions——?

Mr. Mitchell: Financial interest in the future.

The Master: This does not go in with any bearing on operating expense?

Mr. Mitchell: No. We take this position: Here is a con-

[fol. 183] tinuing order, and we are meeting a suggestion that might be made, that we would not need any money in the future. We are pointing it out in probably unnecessary detail.

Mr. Carmichael, continuing:

Q. That exhibit represents your best forecast and estimate as to the amount of capital requirement on the Duluth division for 1924?

A. It does.

Q. And totals what figure?

A. $487,800.

Mr. Carmichael: We offer complainant's Exhibit 27 in evidence.

Received subject to objection and corrections.

Q. Exhibit 28 will be taken up later. Mr. Warren, Plaintiff's Exhibit 29 is what?

A. Exhibit 29 is a statement of the operating income of the Duluth division of the company as estimated for the year 1924, at the Commission's rate of fare, six cents, with five tickets for a quarter, assuming 7.6% cash, and 92.4% ticket pasengers. It shows that the operating income available for return, with that rate of fare during 1924, at the estimated number of revenue passengers, would be $89,305.64; and it compares that operating income, or that return, with the return allowed by the Commission of $345,000; showing that, as compared with the return allowed, the return that would be received would be deficient to the extent of $255,694.36. It then compares the return upon the same valuation as that found by the Commission, $4,999,978.22, at 8%, and shows that at that rate there would be a deficiency of $278,694.36. It then compares the return on that valuation at 8%,—upon the same valuation, and shows that there would be a deficiency of $301,694.36.

[fol. 184] Mr. Richards: Why don't you put it at 9% and 10?

The Witness: It then takes the same commission valuation, and shows the additions to property during 1912, and the estimated conditions during 1923, added, and shows the return upon such a valuation at 7½, 8, and 8½ respectively, showing a deficiency of $275,098.03 at 7½; $299,391.61 at 8; and $323,685.19 at 8½. It then shows the returns on valuations, from there on, at different amounts.

Mr. Carmichael: That is on valuations of six million, six and a half million, seven million, and eight million?

The Witness: Yes.

Mr. Carmichael: Exhibit 29 is offered in evidence.

Received subject to objection and corrections.

Mr. Carmichael, continuing:

Q. Mr. Warren, complainant's Exhibit 28 is what?

A. Exhibit 28 is an estimate of the capital requirements of the Duluth division of the Company for the ten-year period ending December 31, 1934, being an estimate of capital requirements for the years 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, and 1934; and shows a requirement for the year 1925 of $130,000; in 1926, $140,000. In 1927, $150,000. And the same amount, $150,000 for 1928. For 1929, $160,000. For 1930, $160,000. For 1931, $160,000. For 1932, $170,000. For 1933, $180,000. For 1934, $200,000.

Q. That exhibit was prepared by you, based upon your experience for the last ten years?

A. It was.

Q. And projected into the future?

A. Yes.

Mr. Carmichael: We offer complainant's Exhibit 28 in evidence.

The Master: Received, subject to objection and corrections.

[fol. 185] Q. Now, Mr. Warren, referring to the exhibits as a whole, from numbers 5 to 29, both inclusive, were those exhibits prepared to represent actual figures from the boks of the Company, and are they correct?

A. They are.

Q. Do they reflect the actual and true condition, as shown by your books and accounts, and the books of the company?

A. They do.

Q. Were the exhibits, so far as they represent estimates for the future, the best estimates that you have been able to make, based upon your experience in operating this company for the last thirty years?

A. They are, and they do. I have made no attempt to foresee unusual happenings in the future, and I have only made the estimates on the assumption that the present ten-

dencies as they now exist will continue on the same conditions that we have today, and as they have been in the most recent past years.

Q. Calling your attention to plaintiff's Exhibit 30, I will ask you what that is.

A. Exhibit 30 is a table or statement showing the trend of street railway affairs in American cities, giving the average rate of cash fare charged by electric railway, based on the rates in effect in 275 cities of over 25,000 population. It shows the average rate of fare in such cities as of July 1, 1923, at 7.28.

Q. And the commencing period is December 31, 1917?

A. Yes.

Q. And the average rate is what, on that date?

A. 5.09¢.

Mr. Carman: In order that we may know what to examine about, on this exhibit, we want to ask some questions, now.

[fol. 186] Mr. Carmichael: Maybe I can assist you in that. Was this exhibit compiled by you from information which you got from your trade journals, and information gathered by the American Electric Railway Association?

The Witness: It was.

Mr. Carmichael, continuing:

Q. And the information disseminated by the American Electric Railway Association is considered in your trade as being substantial and accurate?

A. We accept it as such.

Q. You understand it so to be?

A. Yes.

Q. And from the information acquired from these sources, this exhibit was prepared?

A. Yes, entirely from that.

Q. Representing the average rates of fares in 275 American cities, of over 25,000 population?

A. Yes.

Q. At the various periods therein stated?

A. Yes.

Q. Do you understand it to be weighted average, or numerical average, Mr. Warren?

A. I would understand it to be a numerical average, Mr. Carmichael, each city being taken as a unit, rather than the size being considered. I may not be correct in that, but I would assume it was numerical average.

Mr. Carmichael: We will offer Exhibit 30 in evidence.

Mr. Carman: Is any of the information contained in Exhibit 30, information which you have a personal knowledge of, yourself?

The Witness: Some of it; very little of it.

By Mr. Carman:

Q. Do you know of your own knowledge, without acception the statement of any other person, that any part of [fol. 187] this exhibit is correct?

The Witness: I know, of my own knowledge, that that is the fare in several of those cities, but to that extent only.

Mr. Carman: But do you know of your own knowledge what the fare was in any of these cities during all of the time covered by Exhibit 30?

The Witness: I do not know that I do, of my own knowledge.

Mr. Mitchell: Well, you do, in Duluth, and in St. Paul?

The Witness: Yes. In Superior, Minneapolis, St. Paul, and Duluth.

Mr. Carmichael: We will offer Exhibit 30, or we have offered it.

The Master: It will be received, subject to correction and objection.

Mr. Carmichael: That completes the testimony of Mr. Warren at this time, except that Mr. Mitchell has some questions he wishes to ask. And I would state, for the benefit of counsel and the valuation engineers, and your Honor, that Mr. Warren wil- be here, available at any time, and we invite cross-examination of him, at length, or in any way that we can make it, after they are familiar with the exhibits. That is all, Mr. Warren at this time.

Mr. Mitchell: And also the books from which the data has been compiled will be available to the examination of counsel and the engineers.

Mr. Carmichael: That will complete the testimony we have for today. Mr. Mitchell will examine some gentlemen

tomorrow, the gentleman from Columbus, Ohio, and the investment bankers who will be here to testify as to the rate of return.

[fol. 188] Mr. Carman: I think I might save a little time later, perhaps, by questioning Mr. Warren now in relation not to the exhibits that have been put in, but concerning certain facts which we think very relevant, on account of the objections that were made at the outset of the testimony.

The Master: Mr. Warren, will you take the stand again?

Mr. Mitchell: There is no objection to a complete cross-examination now of Mr. Warren, except that we have thought that, until after the examination of the books, it would be simply a waste of time.

The witness Herbert Warren thereupon resumed the stand for

Cross-examination.

By Mr. Carman:

Q. Mr. Warren, you are familiar, in a general way, with this Chapter 278 Session Laws of Minnesota for 1921, under which the Commission acted in the making of its order involved in this action, are you not?

A. Yes, I am familiar with it.

Q. Prior to the enactment of that statute, known as the Brooks-Coleman Act, the Duluth Street Railway Company was operating under original franchises or agreements with the City direct, was it not?

A. Yes.

Q. And up to that time, the Railroad and Warehouse Commission had never had anything at all to do with the question of rates to be charged, or anything else concerning the Duluth Street Railway?

A. That is true.

Q. Now, your agreement with the City of Duluth, under [fol. 189] which you were operating, was about to expire in 1921, was it not?

Mr. Mitchell: 1931.

A. In 1931, was the date of expiration.

Mr. Carman, continuing:

Q. And that agreement *called for operation at a five-cent* fare, didn't it?

A. I do not know that I can answer that.

Mr. Mitchell: That is not the best evidence, I assume.

Mr. Carman: I thought we could save time by getting into the record facts which are easily provable by another method that I could save time by asking questions of the officers of the Company.

Mr. Mitchell: The franchise did not require a five-cent fare over the entire city; there was a five-cent fare, but there were a number of franchises, there was no one franchise which covered the entire city.

Mr. Carman: That is what I would be very glad to have the witness explain.

Mr. Mitchell: I don't know whether he knows that, or not.

Mr. Carman: Well, if he does not know, he may say so.

The Witness: I would have to answer the question No. Your question was, if the agreement provided for a five-cent fare? I would have to answer that, No.

Mr. Carman, continuing:

Q. What fares are you authorized to charge, in your agreement with the City, existing at the time the Brooks-Coleman Act was passed?

Mr. Carmichael: That is objected to as incompetent, irrelevant and immaterial. I do not know that it makes any difference, but whatever was provided in those franchises has ceased to exist. We are operating under an indeterminate permit. I think I can state, with a fair de-
[fol. 190] gree of accuracy, to counsel, what the provisions were of all those various franchises, and how much we were allowed to charge.

The Master: Objection overruled.

A. I could not answer that in a word. It is a question that I would perhaps have to ask our atorney. I would not know, myself, just what were the fares that we were allowed to charge, under all the franchises, at all places.

Mr. Richards: What were you allowed to charge under the special act of the legislature in 1881, the main franchise?

A. Well, there was a five-cent fare specified, under certain restrictions and limitations.

Mr. Carmichael: Wasn't there a five-cent fare for three miles? Couldn't you charge 5¢ more for the next three miles?

The Witness: There was a provision that a ride of more than three miles should not be given for one fare of five cents.

Mr. Carmichael: If we have to try out the question of what we could have charged under all the old franchises, it will take a long time.

Mr. Carman: This is not an attempt to try that out at all. I stated at the outset the position which we take, of which we desire to have a record, and have the appellate court pass on it, which has been presented by motion in the court on August 6th, and which, to state it again is: That the Duluth Street Railway Company, for a valid consideration, made an agreement, in its acceptance of the Brooks-Coleman Act, to abide by the rates and valuations fixed by the Railroad and Warehouse Commission of the State of [fol. 191] Minnesota and the courts of the State of Minnesota, to which an orderly appeal from the rulings and finding of the Commission would lie. Now, I take it that it is perfectly material to have in this record for review, the facts upon which that motion is based, the fact that the Company did file its acceptance, and the situation with reference to the Company at the time it filed its acceptance; so that the situation may be judged as to whether or not a contract was made, and if so, whether or not a consideration existed for it.

Mr. Mitchell: Haven't you everything you want in paragraphs 2 to 4 of the complaint, where we recite the franchise under which we are operation and where, in paragraph 4, the Company alleges our acceptance of the ordinances, and attaches a copy of the acceptance to the bill of complaint, as Exhibit "A," and the answer admits that it is a true and correct copy of our acceptance, and the time of filing?

Mr. Carman: That is true, but that does not go at all to the situation. It does not show at all what the situation was preceding the time the acceptance was made.

The Master: I understand that there has been at least some argument before the Court, but I doubt very much if it is a matter that I could be asked to pass upon. I think that any record that the City or the Commission desires to make ought to be made, and they ought to have the fullest latitude in presenting the facts, and presenting them in their own way. So I shall overruled any objection, because I think they ought to have,—if there is any question that they desire to make of record, that they shouls have the opportunity to do so.

[fol. 192] Mr. Mitchell: The record shows now all of these various franchises. They are not set out, but it shows what they were, in our complaint. I merely state, for the information of all of us, that I do not think Mr. Warren can tell. I am certain I do not know, and I have given the matter a great deal of study. There has been some litigation, and if anybody can tell what we may have charged under this franchise existing at that time, he is a good one. But there would be no objection. I am merely saying this in explanation. I do not want Mr. Warren to appear to be ignorant of the affairs of the Company. He does not know what they could have charged, and I don't know, and I have given it more study than he has. We have had these various franchises and agreements. We were actually charging only five cents at the time that Chapter 278 was passed. We were actually charging only five cents, but the Company claimed the right to charge more than that. It was charging ten cents at one time, and then, to satisfy one particular faction (almost one individual of the city) it was made five cents.

Mr. Carman, continuing:

Q. Mr. Warren, how long had a five-cent fare been in operation in Duluth, preceding the year 1921?

A. I don't know just how long. There had been a ten-cent fare for some time on one line, shortly preceding that. How long it was in effect, I do not now recall.

Q. Had it been in effect five years, would you say?

A. No. There had been a five-cent fare generally, with the exception of a period of a year or two, and ten cents on one line;

Q. The five-cent fare generally, with those exceptions, had been in effect for a very long time?

A. Yes.

[fol. 193] Examined by Mr. Richards:

Q. In 1881 was the main franchise?

A. I think so. It might have been a double rate at some time—I don't know.

Q. And during the time there was an attempt to charge ten cents as the fare to Morgan Park, on that line—heretofore? That was in operation for a while at that rate?

A. The fare was charged.

Q. Some litigation was started, wasn't it?

A. I do not recall that there was any litigation—Oh, yes, there was.

Q. As a result, anyway,—we will put it this way,—the Street Railway waived any claim to a double rate, and shortly after that was done they waived the double rate,—and they had been operating at a five-cent fare, even to Morgan Park, up to the time of the passage of the Brooks-Coleman act?

A. It is true that we operated at a five-cent fare for some time previous to the passage of the Brooks-Coleman Act. As to the rest of it, I do not recall.

Q. And was there litigation in regard to the right of the Company to get more than a five-cent fare beyond a distance, say, of three miles at any time?

A. I do not recall now.

Q. At any rate, since you have been there, some thirty years, it was practically a five-cent fare in the City of Duluth, except this Morgan Park?

A. Yes, that is true.

—. And that applied even to Lakeside, Park Point, and to Woodland, and to all parts of the city?

A. No, it did not, to Park Point.

Q. Oh. Park Point. What time did your Company take that line over?

A. I would not be sure now. I think it was about 1917, [fol. 194] though.

Q. Prior to that, you had a traffic arrangement with the company that owned that little branch down there?

A. Yes, a transfer arrangement.

Q. So that a passenger over that line would go for five cents, until he ran up against their line, anyway?

A. True. He would ride for five cents on our line.

Q. Since you took over the Park Point line, have you been charging anything more than five cents fare from any part of the city,—the extreme length of the line?

A. No, we have not, until the passage of the Brooks-Coleman law.

Q. Isn't the real situation, then, that the Brooks-Coleman law wiped out the five-cent rate, and set in motion the machinery which landed us where we are now, in this court?

A. Why, yes, I presume it did.

The Master: Will/ you gentlemen want finding on this question?

Mr. Carmichael: I do not believe it comes under the ruling of scandalous, but I think it is irrelevant.

The Master: I may be entirely wrong, because the pleadings have not been read, and I know nothing of the argument which took place the other day; but if I can understand the answers of some of the gentlemen for the defense, it is contended that the Company, being compelled to charge no more than five cents, and some of the franchises being about to expire, immediately accepted the provisions of the Brooks-Coleman law and agreed to come under the provisions. Now, did that constitute a contract between the company and the State of Minnesota, in which [fol. 195] they agreed to be bound by all the provisions of the Brooks-Coleman Act, including the exclusive remedy from any order of the Commission to appeal to the State courts?

Mr. Carman: That is exactly the position we have taken.

The Master: I shall not pass on that question, but if the parties require findings as to the rights of the Street Railway Company prior to the passage of that law, I think they are entitled to it.

Mr. Mitchell: It has been suggested that if the Master is going to undertake to determine that, then we want the franchises in evidence.

The Master: I am not going to determine that, but I will include in my findings any fact that either party considers relevant to the whole issue. My duty is to make a report to the Court which will raise every question that either party desires.

Mr. Mitchell: There is no question, of course, but that the Company thought that it was to its advantage to surrender whatever rights it had under those old franchises, and accept whatever advantages there were under Chapter 278. In other words, Chapter 278 could not, in its entirety, have been imposed upon this Company, except by this Company's consent, because this Company had a contract right in certain franchises of which it could not have been deprived without its consent. One of those rights was in connection with fares, whatever they were. Another of those rights was in connection with extensions. Those are sufficient to illustrate. Under the Company's [fol. 196] franchises, the City had no*t* right to compel it to make extensions anywhere. If the City ordered it to make an extension, and it failed to do so within a certain time, it lost its exclusive rights upon those streets. Under Chapter 278, the City is given the absolute right to require extensions, and it is even provided that there shall be no appeal to the courts from such an order Now, the Company gave up an advantageous position there. The Company had an absolute right to charge a specific rate of fare under those old franchises. The Company gave up those rights. And our contention, and up to date the decisions of the federal court are, that we thereby submitted ourselves to the entire control of the State in its legislative capacity, and this fixing of this rate is part of the exercise of that control which we agreed the State might exercise. For your information, three hours were spent before Judge Booth a week ago arguing this question. The same question was also argued at almost equal length before the three judges in the St. Paul case, some two year- ago, November 8, 1921. It was contended there by Mr. Nelson (the then City Attorney, now the Mayor), who argued the question,—He took the same position that the Attorney General's office takes here. Mr. Pierce Butler argued the question for the Company; and the three Judges, Judge Sanborn, Judge Booth and Judge Morris, who heard that

argument, decided that question at that time, and decided in favor of the jurisdiction of the court, and against the theory that any contract had been made. The precise question was raised in this case in the motions heard before Judge Booth on August 6th. (Mr. Carman, I understand, was not responsible for making that motion. He was nothere.) It was argues by Mr. Brown and Mr. Richards at [fol. 197] very great length, and it was denied by Judge Booth in quite an elaborate oral opinion. All the arguments which counsel have used today here, in the various forms, were used there. I do not object to their making their record in any form they want it. That question certainly has been presented, however, and is in the record, and if this court does not have any jurisdiction, why, they have not consented to going on and trying a new case. We nowhere claim that we did not give up whatever position we had under the old franchises, and accept whatever position we take under this law. That, we concede. We do not anywhere claim that we did not do that voluntarily and because we thought it would result in actual money advantage to us.

The Master: That is, a consideration?

Mr. Mitchell: I do not want to use that term, because that is a term of contract.

The Master: Isn't that what the object is, to show that there was a consideration?

Mr. Mitchell: I do not admit for a moment that there was a contract. It is as well settled as anything could be settled, that we could not, if we wanted to, have made a contract which would have deprived the federal court of the right to entertain jurisdiction on this question. And Judge Sanborn's decision was,—in one sentence, in less than an inch of space,—first, he did not think any contract was made; but, if any contract had been attempted to be made, it would be void, because it would be against public policy; and Judge Booth, in a much more elaborate decision, held that no contract had been made, and even if the parties had attempted to make a contract it would merely be a contract [fol. 198] that the federal court would not exercise jurisdiction, itself, upon the local question.

Mr. Richards: Pardon me. I confess I cannot agree with you in what Judge Booth held there. Let us wait until we get this written up.

The Master: You will not have my consent to argue that question to me, because I cannot decide it.

Mr. Mitchell: Well, we agree that Judge Booth denied the motion?

Mr. Richards: We will agree to that.

Mr. Carman: All we want to show is certain facts. We will take up in the appellate court whether or not Judge Sanborn or Judge —— are right or not.

The Master: I have no doubt that, so far as the District Court is concerned, this matter has been settled; and so far as I am concerned, of course, it would be a piece of impertinence on my part to find anything different. But if you can agree on the facts, it may save a lot of bother, because I think that these gentlemen desire to make that a question that should be reviewed, upon which the decision of the District Court should be reviewed. They are clearly entitled to do that.

Mr Mitchell: All I am suggesting is that, if they want to show the facts, to make a record, any evidence as to what the rights were, other than the franchises themselves, would probably be not the best evidence.

Mr. Carman, continuing:

Q. Mr. Warren, the plaintiff has been charging generally a five-cent fare, as you have just stated in your testimony, [fol. 199] with the exceptions you have stated in your testimony, preceding the year 1921. That is correct, is it not?

A. Yes, that is correct.

Q. And preceding the year 1921, it was not the Company's contention,—at least during the last two or three years preceding,—that a five-cent fare did not yield an adequate return, was it?

A. Yes.

Q. Then the Brooks-Coleman Act, Chapter 278 Session Laws of Minnesota for 1921 was passed, and the Company then filed its consent, shown as Exhibit "A," attached to the complaint in this action, and came under that law?

A. Yes.

Q. And then following that, the application, provided by that Act for making an application fixing a rate, was made to the Railroad and Warehouse Commission of the State of

Minnesota, and was heard, and a valuation made, and the rate fixed as shown by the order of the Commission involved in this action,—being its order attached as an exhibit to the complaint and dated July 13, 1922?

A. That is correct.

Q. Then, immediately following the making of that order, and without an appeal by the Company to the State District Court from the order, under the provisions of the Brooks-Coleman Act, this action now pending in the federal court in which this hearing was had, was started?

A. I believe that is true.

Mr. Carman: That is all.

Mr. *Carman*: That is all, Mr. Warren. Mr. Carman, might it be understood that plaintiff's Exhibit "C," attached to the complaint, is a true and correct copy of the [fol. 200] order of the Railroad and Warehouse Commission?

Mr. Carman: I have not admitted it. I assume it is. We have a certified copy here which we will offer in evidence.

Mr. Carmichael: Very well. That will be all right, then.

An adjournment was thereupon taken until ten o'clock Wednesday, August 15, 1923, at which time the hearing was resumed, at the same place, and with the same appearances, as follows:

Duluth, Minnesota, August 15, 1922—10 o'clock a. m.

[fol. 201] A. M. Robertson, being first duly sworn, testified as follows:

Examined by Mr. Mitchell:

Q. Give your name and connection with the Duluth Street Railway Company.

A. A. M. Robertson; President of the Duluth Street Railway Company.

Q. How long have you been President of the Company?

A. Since January, 1916.

Q. What was your relation to the Company prior to that time?

A. My first relation with the Company was in 1903, when the then President of the Company, Mr. C. G. Goodrich, arranged for me to take up the negotiations for the power contract with the Great Northern Power Company, and I did so, and negotiated that contract.

Q. Did you have something to do with getting out the trust deed in connection with the bonds of the company?

A. I did have, with reference to the general mortgage bonds. I was given charge of that work by Mr. Goodrich, and did complete all the arrangements for increasing the capital stock of the company at about the same time, and the preparation of the trust deed, and securing an issue of $2,500,000 of five per cent general mortgage bonds, and the negotiations with the Railroad and Warehouse Commission of Wisconsin in connection with the authorization of the increased stock and the issue of the general mortgage bonds.

[fol. 202] Q. Do you know something of the history of the Company before this date?

A. In connection with the increase in the capital stock and the getting out of the general mortgage bonds, I made as thorough an examination as was possible to make of the organization, early financing, and the financial setup of the Company, from time to time, down to 1910.

Q. What, in a general way, had been the Company's history, prior to that time?

A. It had a very interesting history. It started in operation in 1881-1882, as a horse car line, went through the various vicissitudes of horse-streetcar companies, became electrified, and led rather a precarious existence; and (if I may look at my memorandum) I think it was in 1890 that it was in default in the interest on its bonds, and was thrown into the hands of a Receiver, and it remained in the receivership until 1900.

Q. At that time—until 1900—did the Duluth Street Railway Company have anything to do with the Superior street railway line?

A. It had not. The Duluth Street Railway Company was separate and distinct from the street railway system and company in Superior, the Superior Street Railway Company being at that time operated by a corporation

known as the Superior Rapid Transit Railway Company in which the Duluth Street Railway Company had no interest.

Q. Was there, about in 1900, a re-organization of the street railways at Duluth and at Superior?

A. In August, 1900, the re-organization of the Duluth Street Railway Company was completed, and in the meantime the Superior Rapid Transit Railway Company's prop-
[fol. 203] erty in Superior had been acquired by the Duluth Street Railway Company, and the Company became a unit, so far as operation was concerned.

Q. And after that time, the Superior street railway line and the Duluth street railway line have been owned by the Duluth Street Railway Company?

A. Since that time, the Superior Street Railway Company has been a part of the Duluth Street Railway Company, operated and owned by the Duluth Street Railway Company, and known as the Superior Division of that Company's property.

Q. At or subsequent to that time, did the Duluth Street Railway Company issue bonds?

A. At the time of the re-organization, an issue of two and a half million dollars of first mortgage five per cent bonds was gotten out by the Duluth Street Railway Company; the *the* property in Superior, Wisconsin and Duluth, Minnesota being jointly pledged as security to the indenture of mortgage.

Q. What was the total issue under that trust deed?

A. Two and a half million dollars ($2,500,000).

Q. The rate of interest?

A. Five per cent.

Q. Date of maturity?

A. May 1st, 1930.

Q. Have all of those bonds now been issued?

A. All of those bonds are now in the hands of the public.

Q. Then later you personally had to do with the issuance of bonds that were secured by second mortgage?

A. Yes.

Q. And that is what was called general mortgage?

A. Yes.

[fol. 204] Q. When do those mature?

A. They mature on the same date, May 1st, 1930.

Q. Rate of interest?

A. Five per cent.

Q. What number of those bonds were authorized?

A. Two and a half million.

Q. How many of those have been certified?

A. May I consult my memoranda, so as to be sure to answer as to these figures correctly?

Q. Yes, I will be glad if you will, as to all these figures. And give, if you will, without further questioning, the financial set-up, as it was at the date of the Commission's order, and state whether or not any changes have been made in the amount of bonds as outstanding, or the amount of property outstanding since the Commission's order.

A. No, there has been no change made in the amount of outstanding stock since the authorization of this increase of one and a half million dollars in the capital stock of the Duluth Street Railway. There has been a change in the number of the outstanding bonds under the general mortgage.

Q. Has there been a change in the number of those bonds since July 13th of last year?

A. No, sir. But you are speaking——

Q. Of the Commission's order.

A. I had that confused with the Railroad and Warehouse Commission of Wisconsin.

Q. Then, in stating the financial set-up of the Company at the present time, you are also stating what it was on the 13th of July last, and what it was for some time before that, with the single exception that in May last there were certain of the general mortgage bonds retired under the [fol. 205] sinking-fund provision of the mortgage.

Mr. Richards: Will you state what amount was so retired?

The Witness: I cannot state, but I can get you the information. We have it here.

Mr. Mitchell, continuing:

Q. How many general mortgage bonds—I think I asked—have been certified?

A. The general mortgage bonds outstanding June 30, 1923, were $969,000.

Q. Those are outstanding in the hands of the public?

A. Yes.

Q. How many were held by the Company in its treasury?

A. The Company has in its treasury, unsold, $181,000.

Q. Now, under the divisions of that general mortgage, is the sinking fund provided for?

A. The sinking-fund is provided for. That requires the Company to retire two and one-half per cent of the outstanding bonds on the first day of May of each year. And there have been retired and canceled, under the sinking-fund provision to date, $291,000.

Q. Are those canceled, or are they kept alive.

A. They are canceled. And there are general mortgage bonds in the hands of the Trustee, unauthenticated, of $1,059,000.

Q. Now, I think it would be well if we could tabulate here in this way: General mortgage bonds, authorized?

A. $2,500,000.

Q. In the hands of the public?

A. $969,000.

Q. In the treasury of the Company?

A. $181,000.

Q. Retired under the sinking fund?

A. $291,000.

Q. Unauthenticated?

A. $1,059,000.

The Master: Then, to go back to your first question, you asked how many had been certified?

Mr. Mitchell: Yes, Mr. Robertson used the word "authenticated" where your Honor and I have used the word "certified." It means the same thing.

[fol. 206] Q. Then, as I understand the situation, there is now, and at the time the Commission's order was made there was, outstanding First Mortgage Bonds over the entire system of $2,500,000?

A. Yes.

Q. The general mortgage bonds being secured by second mortgage on the property of the Company?

A. Yes, sir.

Q. Both issues of those bonds are five per cent bonds?

A. Yes, sir.

Q. And both mature at the same time?

A. Yes, sir.

Q. Being what date?

A. May 1, 1930.

Q. The First Mortgage Bond is a closed mortgage, at the present time?

A. It is.

Q. No additional bonds can be gotten out under it?

A. No, sir.

Q. As to the Second Mortgage, there have been certified, and now in the hands of the treasurer of the Company, $181,000?

A. Yes, sir.

Q. Those could be sold at any time if the price could be obtained which would be approved of by the Commissions of Wisconsin and Minnesota?

A. Yes. That is, we have no knowledge as to what the Railroad and Warehouse Commission of Minnesota would approve of, as to their conditions necessary to approval. But in the order of the Railroad and Warehouse Commission of Wisconsin, authorizing the issue, it is provided, among other things, that the bonds shall be issued for money only, and for not less than 75 per cent of the par value thereof.

Q. That order stands at the present time?

A. Yes, sir.

[fol. 207] Q. And now as to the $1,059,000 bonds which are still in the hands of the Trustee, uncertified: What are the conditions as to earnings that are required before they can be certified? Do you know what those conditions were?

A. I do. The provision is that it shall be shown by affidavit of the auditor of the Company that the net earnings of the Railway, for twelve of the thirteen months next preceding the request of said Railway Company to said Trustee for such authentication and delivery, shall have been at least twice the interest on all outstanding bonds of said Railway Company, and likewise to one year's interest upon the additional amount for which authentication and delivery is requested. And it further provides in the mortgage that only one $1,000 bond can be authenticated and issued for each $1,200 of actual cash cost of new property,—extensions, and permanent improvements.

Q. You have read into the record the language from the trust deed securing the general mortgage bond?

A. I did; yes, sir.

Q. So that, applying that division, have you calculated so that you know what earnings the company would have to make before it could obtain certification of additional bonds?

A. I have made no computation personally, no. It is a very simple matter. So far as the outstanding bonds are concerned, it would be simply multiplying the interest twice.

Q. How many are outstanding?

A. Two and a half million.

Mr. Richards: I understand that has been reduced?

The Witness: No, sir. The first mortgage bonds have not been reduced. There are two and a half million first mortgage bonds, $969,000 general mortgage bonds, plus $181,000 in the treasury.

[fol. 208] Q. Then, if I have calculated that right, it would require $365,000 of net earnings plus one year's interest on the additional bonds?

A. Plus twice one year's interest on the additional bonds.

Q. Yes.

A. On whatever amount of additional bonds were requested to be authenticated.

Q. So, if you are asking to get out $100,000 new bonds, that would add $10,000 of interest?

A. Yes.

Q. So that, as it now stands, if you wanted now to apply for $100,000 of additional bonds, to be certified, you would have to show net earnings for twelve of the thirteen months immediately preceding, of at least $375,000?

A. Yes, sir.

The Master: That is, on both systems?

The Witness: Yes. That is on both systems.

The Master: That is the entire system. I suppose it is not right to call it "both systems." It is one corporation?

The Witness: Yes, one corporation.

Q. Are the earnings for the entire system at the present time sufficient to enable you to get out the additional bonds?

A. They are not, and they have not been for five years past.

Q. Have you determined—that is, have the engineers, in

their determination, agreed upon a basis of division of the entire valuation between the two systems, in percentages?

A. I do not know what that percentage is, but—Do you mean the apportioning? Oh, the accountants have apportioned the capitalization as between the Duluth and the Superior divisions on this basis, which is the same as was testified to before the Railroad and Warehouse Commission of Minnesota: Capital stock, system, $1,800,000, Duluth [fol. 209] Division.

The Master: That is the outstanding capital stock.

The Witness: That is the outstanding capital stock; the authorized capital stock for the system is $2,000,000. The extra $200,000 not having been issued, is not included in the apportionment between the two divisions.

Mr. Richards: What do you mean by that, Mr. Robertson,—not included in the apportionment? If it was apportioned, what per cent would be apportioned to the Duluth, of the unissued stock?

The Witness: I assume it would be apportioned in the same ratio.

Mr. Richards: The ratio is what?

The Witness: The ratio in this case is two-thirds Duluth and one-third Superior.

The Master: That is twelve hundred thousand dollars for Duluth?

The Witness: Twelve hundred thousand dollars for Duluth and six hundred thousand dollars for Superior.

Mr. Richards: That would mean that if the unissued stock were sold $133,333, approximately, would apply to the Duluth Division and $666,666 to the Superior——

The Witness: It would be apportioned that way.

Mr. Richards: — in our accounting system.

The Witness: Yes. You mean there, if that $200,000 of stock was issued?

Mr. Richards: Exactly.

[fol. 210] The Witness (continuing his answer): The first mortgage bond, system $2,500,000; Duluth $1,816,000; Superior $684,000; general mortgage bond, system $969,000; Duluth Division $703,882; Superior Division $265,118. Now, all of those figures apply to the outstanding stock and bonds, and the property under both mortgages is jointly pledged as security for the issue.

Q. I would not say jointly pledged,—the part owned by that company.

A. Yes, it is all pledged.

Q. And there is no division of ownership?

A. None whatever.

Q. The foreclosure of the mortgage would take the property in both cities?

A. Exactly.

Q. As there is but one owner?

A. One ownership.

The Master: I would like to ask if those were the apportionments made by the Commission.

Mr. Richards: I was going to ask that question.

The Witness: The Commission never has passed on that in either state.

The Master: So when you speak of accountants, you speak of your own accountants?

The Witness: Our own accountants, the thirty-five accountants that have certified our books.

Mr. Carmichael: Which has never been disapproved of, has it, by the Commission?

The Witness: No, it has not been disapproved, never questioned.

[fol. 211] The Master: Can you tell why the apportionment was different as to the stock and the bonds?

The Witness: I don't think it is any different.

The Master: But I had the figures, as it seems to me—for instance, the stock is divided two-thirds and one-third.

The Witness: Oh, yes, I can explain that.

The Master: And the first mortgage bond, you say eighteen hundred thousand, out of twenty-five hundred thousand.

The Witness: I don't get the significance of your question. We can divide the proceeds of the bonds because that is additions to property made, on the basis of the actual money put into the new property, whether it is on the Duluth Division or the Superior Division, but it works out substantially two-thirds and one-third,—it has happened to so far. That will come in Mr. Warren's testimony.

Mr. Mitchell, continuing:

Q. It is your understanding that this allocation of the bonds which you make is based upon where the proceeds of the bond were spent?

A. It is; yes, sir.

Q. But the company's property in Wisconsin is operating under the *two* supervision or the general control of the Wisconsin Commission?

A. It is; yes, sir.

Q. And in Minnesota, under the Minnesota Commission?

A. Yes, sir.

Q. And as I understand, the sale of securities of the company, secured by a mortgage upon its property, could only be made after securing the authority of both Commissions?

A. Yes. We have the authority of the Wisconsin Com-
[fol. 212] mission already.

Q. On the bases which you have named?

A. Yes. We would have to make no further application to them. But under the Chapter 278, as I understand it, we would have to apply to the Railroad Commission of Minnesota to get their authority to issue any additional securities.

Q. That has not yet been done?

A. No, sir.

Q. Now, the bonds which are outstanding are owned, as I understand, by the general public?

A. Yes, sir.

Q. Who owns the stock of the Duluth Street Railway Company?

A. The stock of the Duluth Street Railway Company, with the exception of shares necessary to qualify directors, is owned by the Duluth-Superior Traction Company, a holding company.

Q. Organized under what laws?

A. The laws of Connecticut.

Q. Does the Duluth-Superior Traction Company own any property other than the stock of the Duluth Street Railway Company?

A. Not at this time, for some years past.

Q. Was the stock of the Duluth Street Railway Company, at the time of the reorganization, issued direct to this holding company?

A. Yes, sir.

Q. Was the total amount of eighteen hundred thousand dollars issued at that time?

A. No, sir.

Q. How much of the capital stock was issued at that time?

A. Three hundred thousand dollars.

Q. Was that all of the money that the holding company furnished in connection with the handling of the property [fol. 213] of the company, three hundred thousand dollars?

A. Oh, no. No, there was a million and a half money advanced,—a loan made.

Q. In addition to whatever money was furnished at the time of the original reorganization, as I understand it, the holding company later advanced in cash twelve hundred thousand dollars?

A. To the whole property, a million and a half.

Q. A million and a half?

A. Yes, sir.

Q. That was secured as a loan first?

A. Yes, sir.

Q. For how long?

A. Oh, several years. Well, from 1900 to 1909.

Q. And then that loan was finally funded by the issuance of stocks?

A. Yes, sir.

Q. None of the stock of the street Railway Company was ever sold to the general public for the purpose of furnishing funds?

A. No, sir.

Q. Was the stock of the holding company sold to the general public?

A. Yes, sir.

Q. Does the holding company have outstanding any bonds?

A. No, sir.

Q. What amount of stock of the company does the holding company have outstanding in the hands of the public?

A. A million and a half of four per cent preferred stock, and three and a half million of common stock?

Q. How long has that amount of stock been outstanding in the hands of the company?

[fol. 214] A. Since 1900.

Q. That was all issued at the time of the organization?

A. Yes, sir.

Q. You saw, probably, the exhibit that was introduced yesterday in connection with Mr. Warren's testimony, as to the capital requirements of the company, for the balance of 1923, for the whole year of 1924, and also for the ten-year period beginning with 1924?

A. Yes, sir.

Q. Were you familiar with those estimates which Mr. Warren made?

A. Yes, sir.

Q. And in your judgment must the company make large capital expenditures, somewhat along the line of those estimates, if it is to give proper service and satisfied requirements of the City?

A. In my opinion, the company will require at least one hundred thousand dollars of new capital every year for the next ten years, and it should expend about one-half of that amount, or five hundred thousand dollars within the next two years. We cannot stop; we cannot be retarded any more in our progress than we have been, or the service is going to depreciate to a point that it will seriously affect our service to the City. We must provide some shop capacity. At the present time our capacity for painting cars is limited to four cars in the paint shop at a time. We have no more space than that, and it is impossible to keep up with the painting of our cars without additional space. We must provide additional office space, and we must provide adequate and proper quarters for our train men and our [fol. 215] employees and our car houses. The men have been very patient. They have been led to suppose that before long they would have quarters somewhere near comparable with the train men of street railways in other cities. They have not any such accommodations, and those men are entitled to it and they must have it.

Mr. Richards: May it be understood that this answer to this question is objected to on the ground stated by Mr.

Carman, of the State Railway Commission, and the City, in their previous objection made as affecting the introduction of testimony showing conditions subsequent to the date of the Commission order?

The Master: It will be taken subject to that objection.

Mr. Richards: Exception.

Q. The company is now as I understand it completing one extension on what is known as East Eighth Street or East Ninth Street, is it?

A. Yes, sir.

Q. Was that demanded by the City?

A. Yes, sir.

Mr. Richards: And this is subject to the same objection.

The Master: Very well.

Mr. Richards: And all testimony relating to future requirements and present extensions and expenditures, subsequent to the making of the Commission order, subject to the same objection.

The Master: Yes.

Mr. Mitchell: I would like the record to show that my only purpose is to bring out that in the capital expenditures which the company is now making and which it will be obliged to make, it is holding the amount as low as it is possible to be held.

[fol. 216] Mr. Mitchell, continuing:

Q. Had this extension of East Ninth Street been demanded or requested and ordered by the City for sometime before the report was actually made?

A. It has, and some years before.

Q. In one of the estimates, the extention of Kenwood Street is mentioned for next year?

A. Yes, sir.

Q. Was that ordered to be made this year?

A. Yes, sir, some months ago it was ordered to be constructed, in 1923.

Q. And was the extension for next year delayed after considerable negotiations with the Council?

A. After considerable negotiations with the Council and several interviews with the Mayor and other officials, a compromise was agreed to which delays the building of that

line and gives us until next year. As the agreement now stands, the order of the Council requires the construction of that line and the placing of it in operation on or before August 1, 1924.

Q. Does this order take the place of the one which required that that be completed in 1923?

A. Yes, sir.

Q. And was there a suit brought by the City Attorney for writ of mandamus to compel the building of that extension in 1923?

A. Yes, there was.

Q. And it was only dismissed after the company had agreed to build it in 1924?

A. That is true.

Q. And in your opinion will the expenditures, for capital additions in succeeding years, in any less than the amount you have mentioned, enable the company to furnish proper [fol. 217] service and satisfy the community?

A. It will not.

Q. You don't think the company can be accused of recklessly spending the money for capital additions?

A. No, sir.

The Master: May I ask what the rate is in Superior?

The Witness: At the present time the Superior rate is six cents cash, six tickets for thirty-five cents.

Q. Is there a proceeding pending before the Railroad Commission of Wisconsin to fix the rate?

A. Yes, sir, and a valuation of the property, and fixing a rate of fare, proceedings have been pending and are completed, so far as the valuation is concerned. And under an agreement arrived at between the City and the railroad Commission of Wisconsin and the company, the Commission is withholding, for a reasonable time, fixing the new rate of fare, to give the City and the company a chance to arrive at a rate of fare by negotiation, which the Commission will put into effect—it being clear that a much higher rate of fare is necessary to yield us anything like the rate of return named.

Q. Up to date, the City and the company have not been able to agree on that rate?

A. No. We have had two meetings and were to have had one today, but for this hearing.

[fol. 218] Cross-examination.

By Mr. Richards:

Q. You apparently disagree with Mr. Warren in his statement of estimated capital requirements for the ten-year period ending December 31, 1934?

A. I don't think materially, Mr. Richards. I said at least one hundred thousand dollars a year.

Q. And he gives it as high as two hundred thousand in certain cases, and never less than 130,000, so there must be some material difference of opinion between you and him?

A. Well, that difference is because Mr. Warren is on the ground and wants to do more than I think we can probably do. Certainly, if there is any effort of the company that can keep that expenditure below Mr. Warren's estimate, it will be done, and Mr. Warren will co-operate with me in doing so. That is the history of the company in Duluth.

Q. Now, calling your attention to an estimate of capital requirements during the year 1924, Exhibit 27 recites, addition to general office building, to provide additional office room, store room, garages, station foreman's office and employees' waiting and recreation rooms, $199,800. If any regard is had to the interest of the general public reflected in a possible increase of rate, do you consider it reasonable that recreation rooms and employees' waiting rooms and station foreman's office, garages and store rooms should be increased to that extent in 1924, Mr. Robertson?

A. If it can be done. I think the employees of our company are entitled to the best consideration that we can give them, and that we are warranted in giving them, and this [fol. 219] expenditure of money is all required in the interest of improved service and better facilities.

Q. What was to prevent your doing that in the year 1923?

A. We did not have the money.

Q. Or in 1922?

A. We did not have the money and could not raise it. We planned to do this five years ago, just before the war came on.

Q. On top of that is addition to general repair shops, $99,300; those two items practically amount to $300,000?

A. That is true, and it is not a large amount for the necessity. Under the conditions that we are operating now we are cramped and limited in every way.

Q. And yet your operation is efficient?

A. Our operation is efficient, because our men realize the situation and cooperate with us, and we have the most efficient management of any street railway in the country.

Q. I am not contesting that proposition.

A. If it was not so, we never would be able to give the service——

Q. I think I particularly stressed that feature heretofore.

A. You did, and that is why I repeat it, the way I did, I think you will agree with me perfectly that Mr. Warren is one of the best managers in the country and is a dependable man.

Q. But business efficiency requires that this should not be expended in 1921 and 1922 and in 1923?

A. I disagree with you, about business efficiency not requiring it. It did require it at the time, but we did not have the means with which to do it.

[fol. 220] Q. This is, Mr. Roberston, you would like to do it. It would be pleasant to have fine places for the men, and the office force, and all that, but can't you get along another year without that expenditure?

A. Oh, we could drag along, limp along, some way, I suppose, but that is not proper service.

Q. Now, Mr. Robertson, if you prefer to have Mr. Warren testify, I would just as soon not go into these matters of expenditure for 1924, and——

A. Mr. Warren is more competent to testify to that, and he can testify to everything that I can with respect to the construction program before the company.

Mr. Richards: Under that statement I think I will reserve further cross-examination, until Mr. Warren is called again.

Cross-examination.

By Mr. Carman:

Q. Mr. Robertson, the evidence and estimates you have given this morning were presented to the Minnesota Railroad and Warehouse Commission in the hearing which re-

sulted in the Commission's order of July 13, 1922, involved in this action?

A. Yes, sir, substantially the same thing.

Mr. Carman: That is all.

Mr. Richards: That is all.

Mr. Mitchell: This testimony was probably not verbatim, but in substance the same, except as to what changes may have taken place since.

Mr. Carman: That is all I had in mind.

[fol. 221] William A Durst, sworn, testified as follows:

Examined by Mr. Mitchell.

Q. What is your name?

A. William A. Durst.

Q. Your residence?

A. Minneapolis.

Q. Occupations?

A. President Minnesota Loan & Trust Company.

Q. How long have you been connected with the Minnesota Loan & Trust Company?

A. Thirty-four years.

Q. What is now, and what has been, during your connection with that company, its business?

A. One very important branch of the business, and perhaps the most important branch, is the purchase and sale of all kinds of conservative securities.

Q. And have you personally been connected with that branch of the company's work?

A. I have, yes, sir.

Q. For how long?

A. More than twenty-five years.

Q. In that part of the work, is it a part of your duty to be familiar with the different classes of securities that have been sold and offered for sale in this market?

A. Yes, sir.

Q. And has that required that you should know the requirements to make a salable security?

A. Yes, sir.

Q. And that you should know the rate of return in best demand for various securities?

A. Yes, sir.

Q. In your business have you been familiar with the securities of the Duluth Street Railway Company?

A. Yes, sir.

Q. How long?

A. I should think since 1897.

[fol. 222] Q. Your company has handled the securities to a greater or less extent since that time?

A. We have, yes, sir.

Q. Have you also been familiar in a general way with the investment market for Street Railway securities generally?

A. Yes, sir.

Q. You testified, Mr. Durst, before the Railroad Commission in this proceeding?

A. I did.

Q. And have you at the request of the company given further thought to this question, in view of testifying here today?

A. I have.

Q. Before the Commission, Mr. Durst, you gave your ideas as to the basis of the rate of return that would be required for a complete financial set-up of this company?

A. I did, yes, sir.

Q. Have you given further thought to that question?

A. I have.

Q. Will you, in your own way, state to the Master what rate of return you think would be a fair rate of return here, and a necessary rate, to enable the Company to place its securities with the investing public. State it in your own way, and giving your own reasons.

Mr. Richards: Is this referring, Mr. Mitchell, to the present time, or to any particular date?

Mr. Mitchell: Well, I asked him in the present tense. I am willing to put it as of the date of the Commission's order, and then whether there has been any change up to the present time. I will follow your wishes in that.

Mr. Richards: Well, to be consistent, our position is that this is a trial of the validity of the order of the Railroad & Warehouse Commission, as to whether the rate it established, as provided in the order, was confiscatory or not. That related to a former date. Unless we are indulging in

[fol. 223] a new trial, on an original basis, de novo, I think our point of objection would be that the testimony ought to be directed to the time covered by the order of the Railroad & Warehouse Commission. And we do so object to any other way of putting it at the present time.

Mr. Carman: I am assuming that the general objection which was made to all this line goes to all testimony as to conditions subsequent, whether that be testimony covering the condition and operations of the Company, or the money market, or any other matter that is offered here, which could be considered by the Railroad & Warehouse Commission of the State of Minnesota, if offered to it, as of this date, which was not considered or offered to the Commission at the date of its hearing, on which it acted in making its order of July 13, 1922.

Q. I will ask, Mr. Durst, first, whether there is any substantial change in conditions that would materially affect the rate of return that would be required, between the date of giving your testimony before the Commission, and the present time?

A. No, sir, there is no material difference.

Q. Then, your testimony now would apply to the time of giving your testimony before the Commission or at the present time or at any time between?

A. Yes, sir.

Q. Now, I think that clears it up.

The Master: That would clear it up as to this, but could not we have an understanding with reference to the suggestion made by Mr. Carman as to whether all of this evidence is taken subject to that objection? I understand that the contention of the defendants is that this order must be determined as of conditions as they existed at the time of the order.

[fol. 224] Mr. Mitchell: I agree with your Honor as to that.

The Master: And your position is that there are certain surrounding conditions that existed at that time, and may not have fully developed, but were inevitable.

Mr. Mitchell: My position is this, in a word: We are attacking the order, and to attack it, we must show that at the time it was made it was confiscatory. Now, we show that, as to this witness, by showing that the

conditions are no different now from what they were then, so that his testimony as to conditions now is the same as his testimony to conditions then. And I am perfectly willing to have him testify as to conditions then and say that they have not changed. There is that further thought: I think your Honor has it clearly in mind that the order of the Commission is a continuing order, and the action of the Court, while it attacks the original order,—that the Court often says that it is a continuing order. The confiscation is going on daily and when the order is made as to the rate of fare, it necessarily involves a prediction. As to the values and rate of return, it states the facts as found by the Commission. As to the rate of fare, it is the Commission's prediction,—they said, for instance, that this Company was entitled to $345,000.00 a year and they said in their judgment the rate of fare which they prescribed would produce that. Now, evidence as to what has happened since that time is competent, in our opinion, to determine the accuracy of their judgment at that time. This goes to a little different thing. This is as to what was a fair rate of return at that time. Now, if interest rates at that time were abnormally high, and if they have now become normal, it may be that they would claim that a rate of return less than required would be sufficient. Mr. Durst has said that there is no substantial difference. So that I think that his testimony is admissible upon their [fol. 225] theory,—which is mine. I don't think we disagree as to what we are trying to do. We may disagree as to what is evidence of those facts I claim what has happened in the way of return is the best evidence as to what was then a proper rate, because we are substituting facts for guesses. But the evidence as to values, and as to what is a fair rate of return, I think should be competent.

The Master: May I ask if that is the theory of the defendants or is that conceded, that the number of passengers carried and the revenues derived from those passengers and the actual results that have taken place in the operation of the road in that respect, since making that order, is proper to be considered in testing the validity of the order?

Mr. Richards: If your Honor please, that is misleading. It is based upon a state of facts that, if the Commission's order had been left to take its course, would not exist today.

The Master: Well, isn't that a matter as to the effect to be given to that evidence, and not as to its competency or relevancy?

Mr. Richards: To illustrate my point there I would say this, that there was very little jitney competition with the Street Railway Company, prior to the making of the Commission's order and since this memorandum of the Federal Court making a flat six cent rate which prevented the enforcement of any other order,—I guess it will be conceded by our friends on the other side that jitney competition increased very remarkably, running at five cents, and has cut into the revenues of the Company to an astonishing degree. And our claim is that that would not have cut into it at all and would not have changed it——

The Master: Well, isn't that a matter as to the weight to be given to the evidence and not to its competency?

[fol. 226] Mr. Richards: That may be so, if your Honor please, that may be so.

The Master: I am perfectly free to say that it seems to me that the result of the actual operation of the rates during this year seem to be competent evidence, for the purpose of testing the sufficiency of the order of the Commission at the time it was made.

Mr. Richards: Of course, that would imply that we should show the reasons?

The Master: Oh, absolutely,—there is no question about that, but I am simply speaking now of the competency of the evidence. You claim that evidence as to certain transactions or certain conditions arising since the making of the order are incompetent, because as not of this date.

Mr. Richards: We thought so,—I am stating my own thought about that,—we thought that this whole matter should be tried, in as much as the Federal Court had acquired jurisdiction through the restraining order just three and one-half days after the making of the order itself. The Commission's order was made on the thirteenth day of July, Thursday. The following Monday a restraining order from the Federal Court was obtained, and the matter has been in the Federal Court ever since, and that action of the Federal Court absolutely stopped operation of the order, and the order itself has never been tested. It could not be tested. No test has been allowed under it. There

has been none. And therefore, looking at it in my view it seems to me that practically it would be putting the whole situation before the Federal Court, just the same as it came before the State Railroad & Warehouse Commission, that there would be no difference in point of time, it would be practically identical. The grounds substantially would be the same. And I have never reached a situation where [fol. 227] I would be able to consent to any other theory of the trial of our rights under that order, whether it was confiscatory or not. So, logically, we are compelled to take the position that it ought to be tried now as then.

The Master: I don't know whether we understand each other.

Mr. Richards: I would like to close the door after July 17, 1922, when the Federal Court took jurisdiction. If they want to introduce proof to the Court as to those three days, between the making of the order and the Federal Court jurisdiction, that would be all right. But as to anything that is since the 17th of July, we object to it as irrelevant, immaterial and incompetent and not having any fair tendency to show that the order was confiscatory at the time it was made.

The Master: Then, that is a statement which I suppose we can take for the purpose of establishing a rule, that the defendants object to any evidence as to any transaction or incident which arose subsequent to the making of the Commission's order, and that the evidence that is offered against that objection will be taken subject to that objection, without reiterating.

Mr. Carman. Yes.

Mr. Mitchell: I suppose that the record may show that the objection is made and overruled and that exception will be allowed?

The Master: Oh, yes, the objection will be overruled and it is all taken subject to that objection without the attorneys being required to repeat their objection each time.

Mr. Mitchell: As I understand, in all cases where the Master has stated that all evidence is taken subject to the objection, it is not intended that a ruling is later to be made on the admission of the testimony; the testimony is admitted, but it is admitted over the objection, and the [fol. 228] objector is allowed an exception.

Mr. Richards: That is our understanding.

The Master: It is exactly in the same position as in depositions, that the Court will rule on the admissibility of the evidence or the proper theory. I do not understand that there is any ruling being reserved, simply the objection is noted, and the testimony taken.

Mr. Mitchell, continuing:

Q. Now, Mr. Durst, if you remember the substance of my question?

A. I think I do. When a public utility located in a community similar to the community in which the Duluth Street Railway Company is located, finds itself in need of financing, there are certain conditions that it must comply with. In the first place, it would be impractical to expect a bonding house to make a loan on a mortgage to exceed sixty per cent of what might be considered a fair value of the property, and the bonds would not be salable unless the earnings of the Company were at least double the interest on the bond issue. In most issues in communities of this size, the requirement is that the earnings must be more than double, and that is especially true of railway securities. Street Railway securities, at the time of the ruling of the Commission and since and before, have not been considered a very desirable form of investment, and therefore it has been necessary, in order to find a market for them, for the dealers to be able to offer them at higher yields than other public utilities. Not knowing what valuation would be fixed on the properties of the Duluth Street Railway Company, I did in this case, as I did in the previous hearing, I built up a hypothetical case on the valuation of a property being worth a million dollars. I said that the largest amount which a company could borrow would be sixty per cent of [fol. 229] that, or $600,000.00, that the balance would have to be raised through the sale of stock. I believe that those bonds would have to net the investor seven per cent, which would be on $600,000.00, $42,000.00. I believe that the cost of negotiating those bonds would equal three-quarters of one per cent per annum or $4,500.00, making a total annual charge of $46,500.00, and that in order to make those bonds marketable, even at seven per cent, it would be necessary that the company should have earnings of double $46,500.00

or $93,000.00, which would be equivalent to a 9.3 per cent rate on a million dollars. I think that amount would have to be, after deducting depreciation, and after paying the Government income tax of 12½ per cent. The investor today is very loath to go into Street Railway securities because of their uncertainty of the stability of the business. They do not know what automobiles are eventually going to do to the Street Railway business; they do not know what Mr. Ford's plan of a light car, one operator, may do; the trackless system; and it is exceedingly difficult for dealers to dispose of Street Railway securities, and they can only be disposed of in very small amounts making the cost of distribution to the dealer higher than in almost any other kind of securities.

Q. You have stated, Mr. Durst, that the financial program for such a company, in order to market its bonds at all, would have to show substantially an earning of 9.3 per cent upon its fair valuation?

A. Yes, sir.

Q. Now, you say that only sixty per cent of the capital requirement could be raised by the sale of bonds, then, in that way?

A. Yes, sir.

Q. How could you provide the balance of the funds?

A. As I stated, the only way the balance of the funds could be procured, so far as I can see, would be through a stock issue.

[fol. 230] Q. Did you estimate the amount of preferred stock and common stock?

A. Well, I doubt very much if it would be possible to sell preferred stock of Street Railway property where there was a sixty per cent bonded debt preceding it. I think it would be rather necessary to resort to a common stock issue for the entire balance.

Q. What rate of return would you have to get, in order to get that forty per cent in money?

A. That stock would be, of course, absolutely a speculative stock, and it is a fact that your large public utility corporations, your power corporations that have recently purchased power properties in the vicinity of Duluth, would not take your Duluth Street Railway Company if the common stock earned ten or fifteen per cent. People do not

feel favorably toward Street Railway properties. So, it is more or less theoretical as to what sort of market you would find for your stock, but it is an absolute certainty that no one would go in and buy that stock unless it yielded substantially, or earned substantially in excess of ten per cent, because of the very great uncertainties of the Street Railway business.

Q. Yes. You have already mentioned that fact. Do investment bankers at the present time consider that, aside from the uncertainty as to what the Commission may do, or advise from the necessity of apparently going into the Federal Court to get protection, do you and investment bankers other than you, to your knowledge, consider that there is a risk in the business, a risk in continuity of the business?

A. We do; yes, sir.

Q. Because of these things you have already mentioned?

A. Yes, sir, and a risk that does not attend the electrical [fol. 231] business, yes.

Q. Or that attends steam railway?

A. You have another element there that is very objectionable and that is the fact that in the street railway business you deal with your customer once or twice or four times a day. There is no other public utility really that presents the same opportunity for objection to any little defect in the service as does the Street Railway business. It makes it a subject for constant agitation and disagreement.

Q. But it is a fact, then, is it, Mr. Durst, that in order to sell Street Railway securities, a higher rate of return must be offered to the investor than in order to sell other classes of securities?

A. Yes, sir, in order to sell other public utilities, yes.

Q. I mean other public utilities.

Cross-examination.

By Mr. Richards:

Q. Do you know approximately, Mr. Durst, the amount of capital invested in the Street Railway business, as compared with that of the steam railroad business of the United States?

A. No, I don't. I have never seen the figures. I could not even give a guess.

Q. And have you made any study of the comparative risk of capital invested in the electric Street Railway business of the country as compared with the steam railway of the country?

A. Well, I think there is a great deal of risk in steam railway securities, I don't know that there is—as an investor, myself, I should hesitate to put my own money into either class of securities, as far as stock is concerned.

Q. What is your impression of the risk as to steam rail- [fol. 232] roads, as compared with electric street railways, such as Duluth?

A. Well, of course, under the Esch-Cummings bill, the railroads most of them, they that are well constructed and that are well operated, I think could succeed, but if the Esch-Cummings bill should be repealed I should be very doubtful about the ability of any of our western roads to make earnings that would make their securities desirable, outside of their first mortgage bonds.

Q. And yet you realize, do you, that Congress passed a law governing the enormouns capital invested in steam railroads of the country and the Interstate Commerce — has made rules whereby five and three-quarters per cent is held to be a reasonable rate of *rate of* return?

A. Yes, I know that to be a fact, and I know that railroad stocks today are selling at a lower price than in twenty-five years. I think railroads are today in a position where they will have the very greatest difficulty—I know they are—in building necessary extensions and in providing themselves with equipment. I regard that law that has been passed by Congress as absolutely foolish, and that the public will eventually have to pay the bill. I do not regard that as sound legislation, regardless of the fact that Congress has done it. I think the majority of the members of the House and Senate today are in favor of repealing the Esch-Cummings bill, because they feel that that rate is too high.

Q. Too high?

A. Yes, too high.

Q. Then you think the people of the United States think that that rate is too high?

A. Oh, I don't know what the people of the United States think. I would like to correct that statement. I think that for political reasons the members of the House and Senate would like to repeal that law, not because they actually [fol. 233] believe that rate too high. If they had any intelligence they'd know it is not high enough—if they are honest.

Q. Now, I presume you are aware that the act of Congress which provides if any of the favorably located railroads earn in excess of six per cent on the valuation fixed by the Interstate Commerce Commission, that goes into a fund controlled absolutely by the Government for general purposes?

A. No, I don't understand that at all, I don't understand that.

Q. Wherein am I wrong in my statement?

A. Because the railroads are entitled to a part of the excess above six per cent.

Q. Did I say the excess?

A. Yes.

Q. I was mistaken. One-half of the excess,—that is correct, isn't it?

A. Well, I don't think it is exactly. I think one per cent goes to the Government and then perhaps one per cent to the railroads and then above that I think it all goes to the Government, but I think if an eight per cent rate is earned, seven per cent goes to them.

Q. Well, the statute is as it is?

A. That is right.

Q. What do you consider as a fair and proper proportion of stock and bonds ordinarily for an industrial corporation?

A. Well, I think that a public utility, like your company, it might be, and probably would be, perfectly safe to loan up to seventy-five per cent on the value of the property.

Q. No. I don't think you understood my question.

(The question was read as follows by the reporter.)

"What do you consider as a fair and proper proportion [fol. 234] of stock and bonds ordinarily for an industrial corporation?"

A. Industrial——

Q. Yes, in the organization.

A. When you speak of industrial you mean a manufacturing institution?

Q. Well, we will put it a public utility, we will put it a street railway.

A. Well, I was going to explain there is a great deal of difference between utilities. I think that a bond issue which a street railway could float should be for a much lower percentage than for a power company, for instance, hydraulic power. I believe that sixty per cent, as I previously testified,——

Q. Is a fair proportion?

A. Yes. It is high, it is as much as you could expect to do.

Q. You say high—maximum?

A. Well, yes, I would say the maximum.

Q. And what is the proportion as you figure it for the Street Railway of Duluth of stocks and bonds?

A. I would be unable to figure that because I do not know what the physical valuation is.

Q. But the apportionment seems to be the stock that is issued as two-thirds,—that is $1,200,000.00.

A. Of course, my testimony is all on the basis of a fair valuation and on the basis of a fair valuation with a fair rate of return I would say that a street railway company could not borrow more than sixty per cent of such valuation, in Duluth or Minneapolis or anywhere else.

Q. As I gather your idea, sixty per cent and forty per cent is approximately the proper proportion for street railways?

A. Yes, I think the sixty per cent is the maximum just as you said.

[fol. 235] Mr. Mitchell: That is, sixty percent of the maximum amount to be raised by the sale of bonds?

A. Correct.

Mr. Richards, continuing:

Q. And you say that the stock ought to get ten percent. Well, wouldn't an ordinary stock with a reasonable assurance of paying ten percent be a reasonably desirable and salable security?

A. Why, a good seven percent stock, where it is good, preferred stock.

Q. I am not speaking of preferred, I am speaking whether preferred or common.

A. Well, your common stock would be absolutely speculation and you cannot assure anybody that he would get ten percent, no matter if you guarantee a valuation and rate of return today, today and tomorrow you may get ten percent but there is no assurance that you can continue to do that, because of the great hazards that surround the street railway business. You might give it a valuation and rate of return that would yield then a good deal more than ten percent, and would be so high that it would be impractical. People would not ride. They would not pay the fare.

Q. But we are speaking of an ordinary, fair assurance of a return to the stockholder of ten percent on stock, would not that be considered a pretty fair investment to the average man?

A. I cannot answer that question directly. I think I have got to say that street railway property, as I tried to explain in describing your power situation,—they are not desirable property. People do not desire them, and ten percent power stock would be entirely different perhaps, from ten percent street railway stock. You could interest perhaps ten investors in power stock to one in street [fol. 236] railway stock.

Q. You are speaking from the stand-point of the fact that, whereas most of the street railways of the country prior to 1918 at any rate were operating generally under a five cent fare, under a contract or franchise, the extraordinary increase in prices growing out of the war (we will say it is out of the war), at least there was an extraordinary increased cost of operation, reduced their profits wonderfully and in some cases even below the earning point at all, so that their costs ate up about all the revenue. Is that about the situation?

A. Yes, that is the situation with the five cent fare, with increased operation expenses in many cases.

Q. And that situation being bound under contract, has thrown some street railway companies of the country into hands of receivers?

A. Yes, sir.

Q. And that had a tendency to cause a suspension of investments in street railway companies generally, didn't it, throughout the country?

A. Yes, it had its effect.

Q. And it became such a general proposition that Congress appointed a Committee to investigate the whole situation of street railway companies in the United States and discuss and study the problems of putting them out of their hole,—Isn't that a fact?

A. Yes, sir.

Q. Well, you know as a matter of fact that the Duluth Street Railway Company never got into the hands of a receiver?

A. No——

Q. And don't you know, as a matter of fact, that they are paying dividends right along, up to the year 1921, on its common stock?

A. I had understood that it had been paying dividends, yes.

[fol. 237] Q. And that the dividends——

A. You say on its common stock. It has only one class of stock.

Q. Yes, that is right. It has only one, but it has paid dividends and good dividends each year, 1916, 1917, 1918, 1919 and 1920, did it not?

A. Well, I have understood so. I don't know exactly what dividends they have paid. I think that has been brought out in the testimony.

Q. I think it has been shown here that the dividends that have been paid for the five years preceding your testimony amounted to an average of 11.99 percent, or do you remember that situation being presented to you?

A. No, I don't.

Q. Is it fair to say that the credit which applies to the street railway company when it is asking money is to be considered somewhat on the basis that applies to an individual when he applies for money?

A. Well, Mr. Richards, we might realize that the facts of the case are these: That the Duluth Street Railway Company securities the first mortgage securities, at the time the Commission ruled could be purchased any minute by any investor that wanted them (this was on the first mortgage) to yield seven and a half percent, and on the general mortgage bonds to yield nine and a half percent, as I remember it. Now, I think that that perhaps discloses the facts rather better than to try to compare the

question of the Street Railway Company with some individual. I really don't know how to answer the question, to tell the truth.

Q. Well, my theory is this, in discussing this general question, mustn't we deal with the Street Railway Company as it is under the local circumstances existing, and the general circumstances existing?

A. They have to deal with them, of course, when they [fol. 238] borrow any money certainly.

Q. What I am driving at is whether you in your generalizations are here putting the Street Railway Company in the class with all the others throughout the United States who have gone into the hands of receivers?

A. No, I have distinctly had in mind this particular property in my testimony as to the rate of return that I think would be necessary.

Q. The very fact that the first mortgage bonds of the Street Railway Company were salable, the general mortgage bonds at a price, shows that the Duluth Street Railway Company situation was not taboo among investors, its reputation was good?

A. Well, I don't believe you would think an individual paying nine and a half percent, that his reputation would be considered very good, in Duluth.

Q. Well, that depends upon the circumstances. The legal rate of interest in Dakota I believe is twelve percent and in other places even higher. It depends on circumstances. An individual would pay the higher rate because the circumstances were speculative.

A. Yes, but we are referring to a definite date, the date when the Commission made its ruling. There was no stress, at that particular moment, there was just an ordinary money market.

Q. These bonds, both general and first mortgage, were floated originally at five percent?

A. They bore a rate of five percent, but they were not floated at five percent. Many of those outstanding general mortgage bonds are sold at a very great discount, I cannot tell you what that discount is, I have no doubt the officers of the Company know.

Q. It appears that the Commission found that the cost to the Company of these bonds was 5.18. Do you know that as a fact?

A. No, I don't know anything about it. I don't see that it has any bearing on the case, though, because what the [fol. 239] Company may have been able to sell its bonds for prior to the war and what it would have to pay today or next year or five years from now are entirely different matters.

Q. And with its outstanding bonds, five percent bonds, the question of the rates of interest would only affect new capital, so far as requirements were concerned, wouldn't it?

A. Perhaps I could illustrate that this way: No reputable bond house would go in there and assume five per cent was a fair rate and therefore if the Company was earning double five percent, that that was sufficient, because on the face of it at the time of this particular ruling that has been referred to here you could buy first mortgage bonds at seven and a half, which was fifty percent greater than five, and you could buy the general mortgage bonds at nine and a half, which was practically double the five percent rate.

Q. But we are here facing a proposition in this proceeding of something on a reasonable basis, reasonable to the public to run through a course of years. It is temporary, speculative, variable every month. We are dealing with capital, that wants to have an investment for five or ten years or any other time, and when the facts show that this company has induced capital to invest in its bonds at five percent, doesn't that indicate the condition of the investing public, and their appreciation of the Duluth Street Railway Company?

A. It has no bearing on what it will cost the Duluth Street Railway Company to finance itself in the future. We are on an entirely different basis. Necessarily we must be. And when you consider that fifty dollars in interest, five years ago or ten years ago, could have bought a great deal larger quantity of food or supplies or clothing, or anything else, than we can buy on fifty dollars today,— [fol. 240] everything has gone up, including the rates of interest.

Q. But we are dealing with the investing public.

A. Sure, and they are the people that have to live on their income.

Q. And they are seeking safety, and as they seek safety they are willing to take a lower rate of interest, they are not speculating, they are not what we call the rank speculators?

A. No, a person buying a good first mortgage, what is supposed to be a conservative investment, would not be a mere speculator.

Q. He buys, not for sixty or ninety days, but he buys for years?

A. Yes, and he has the whole line of securities that are involved to compete with.

Q. He is considering whether he will invest in United States bonds,—what is the rate of interest now?

A. About five percent yield.

Q. That is extraordinarily high, isn't it, growing out of the abnormal conditions?

A. It is very much higher than before the war, of course, unless you can buy a long time bond, netting you five percent——

Q. The municipal bond is another favored method of investment. What is the current municipal bond of Minneapolis being sold for?

A. About four and a half percent.

Q. Do you know what the current rate for municipal bonds in Duluth is?—of the City of Duluth?

A. No, sir, I cannot answer that question, I have not seen a quotation on those bonds recently.

Q. How about New York City?

A. I can't answer that question either. The rate of North Dakota long time bonds are selling to yield the investor five percent. The State is paying a profit in addition to that.

[fol. 241] Q. Well, what do you understand to be the legal rate of interest in the State of Minnesota?

A. Well, it seems to me that under the last session of the Legislature it was eight percent, wasn't it?

Q. I don't mean the authorized rate, or contract rate, but what is the rate that runs on capital invested in debts and judgments and so forth?

A. Six percent.

Q. Do you consider that, Mr. Durst, an unfair rate of return to the investor in such cases?

A. Well, the investor is—he does not have to put his money in any particular place. It belongs to him. He is as desirous to get a good return from it as possible, and he is not going to put his money into Duluth or Minneapolis or anywhere else, if he can invest it at a higher rate somewhere else.

Q. Do you think it is confiscating property of any citizen of the State of Minnesota to allow him six percent on his judgments, claims, contracts, and liabilities? Is it confiscatory? Is it unfair to him? Must he have more?

A. Yes, I can conceive that it might be unfair to him, if he could take his money and invest it somewhere else at a higher rate. Money is a commodity. I think a man has a right to place it where it will bring the greatest return. It is his own money. He has earned it.

Recess was here taken until two o'clock in the afternoon at the same place.

[fol. 242] 2 p. m.

W. A. DURST, recalled and the cross-examination was continued as follows:

By Mr. Richards:

Q. Mr. Durst, before the war, was there any situation that required, from the standpoint of the investor, a higher yield from street railway securities than from any other class?

A. Yes. They were in disrepute before the war.

Q. Before the war?

A. Yes.

Q. Were there not well recognized cases where certain street railway companies had a high, first-class credit, even before the war?

A. Yes, yes, but I thought you were comparing with other utility bonds.

Q. I did.

A. Yes. Well, then, I will say that the street railways were not standing as well as other utilities, even before the war.

Q. Could you make any comparison in that respect as to general reputation between them and ordinary gas company utility bonds, before the war?

A. Yes. Gas company bonds—if you could find a case where value and bonded indebtedness and population were about the same, you would find a preference for the gas bonds over those of the street railway.

Q. Hasn't your testimony been colored a little bit, Mr. Durst, by anxiety to favor the investor?

A. Well, I don't see why we should try to favor the investor. No, I don't believe it is. We have a commodity for sale, and of course we do not influence money investors one [fol. 243] way or the other. If we are going to be able to sell them, we must be able to offer it at what thousands of other dealers all over the United States are offering.

Q. And you like to offer attractive propositions?

A. Well I should say that we try to get for our borrowers just as low a rate of interest as we can. I believe our greater interest is in the buyer rather than in the investor. I think that is selfish, but we know we have a lot of competition when it comes to buying securities, and you can make no profit on a security unless you do buy it, because you don't have it for sale. Therefore we try to keep our borrowers feeling satisfied, and try to give them the very best deal we can.

Q. Of course. But they come to you with a definite proposition. They have a proposed issue of bonds and they put them in your hands to sell.

A. Well, that is not the method exactly. They come in and tell us what their property is and what they are bonding, and we sit down and work the thing out.

Q. In other words, you become a kind of agent?

A. Well, we have to advise them.

Q. And then after that consultation and that understanding, why, they come in with an issue and then you do the best you can to close it up for them?

A. We don't close them exactly, we buy the issues outright and then sell them. They may have gone to other dealers before they came to us and may have definite ideas as to what they can do and wish to do.

Q. That is your method, then, that you become the purchaser, yourselves, after the negotiations previously en- [fol. 244] tered into before the offer?

A. That is correct.

Q. Now, you spoke of a basis for a fair return, did you not, a fair return?

A. Yes.

Q. What did you mean by the expression, a fair return?

A. A fair return of earnings, a fair rate of interest or dividends, whichever you may choose, taking into consideration all of the risks and uncertainties of the investment.

Q. Well, did that word "fair" in your thought have a two-sided proposition to it? Did it relate to anything more than just investors?

A. Yes. I think I explained that I can conceive of a valuation and a rate being named by the Court or a Commission that would be so high that it would not be of any practical use to your company,—that they should not operate under it.

Q. In your definition, or thought about what is fair, did you take into consideration the public, who pays the rates?

A. Yes, I certainly have. I do not know of any commodity that has had as slight average advance, all over the United States, as has the street car company in the fares which they receive. In other words, the increase is so small, compared with anything else that we buy, food or clothing or whatnot, that it shows right on the face of it that street railways have not been fairly treated in that respect.

Q. Well, where they are bound under a franchise or a contract, it is because there cannot be a change?

A. Well, changes come, anyway, but it is not the duty of the citizen or the car-riders to enforce them.

[fol. 245] Q. That would be the reason why there would be no advance, though, wouldn't it?

A. Yes, in many cases that was the reason.

Q. You are not attempting in this proceeding to testify as to what is a fair value of any property?

A. No, sir, I do not know it.

Q. Therefore, you are not attempting, and do not wish to have your testimony construed as a statement, that there should be eight per cent or any other per cent on any particular value?

A. No, except that the rate which I named should be on what would be a fair value of the property.

Q. Now, I will put before you, for the purpose of getting your views, a statement of opinion here of a man testifying before a congressional committee, and ask your views upon it. This is Mr. Sisson. I am reading from page 397 of Electric Railway Problems by Wilcox, Mr. Francis Sisson.

He says: "I dealt particularly with the cost of capital and answered the question broadly, that in order to sell bonds to the public and stock to the public, in a proper financial structure of 60 per cent bonds and 40 per cent stock, the return ought to be about 5½ per cent on the bonds and eight per cent on the stock; or a reasonable assurance of it." That is your statement, isn't it?

A. Yes, sir.

Q. (Reading:) "The return ought to be about 5 per cent on the bonds and eight per cent on the stock or a reasonable assurance of it."

A. Well, now, may I answer that question, without it [fol. 246] going into the record?

Q. Well, I don't know.

A. Well, can't we just adjourn this for a minute, for me to make rather a personal statement there about this matter?

Q. Well, I don't know about that. I am asking your opinion anyway on his views, as stated.

A. Why, I think they are ridiculous.

Q. What?

A. I think they are ridiculous. I would say that practically no purchaser or seller of bonds who had any experience whatever would ever dream of setting up any such proposition as that. It just simply cannot be done.

Q. Well, Dr. Durst, these dealers in these bonds of the Street Railway Company were getting less than 5½ per cent on their full amount invested.

A. Well, you might ask me what I thought of Mr. Mitchell or Mr. Carmichael's ability to run a flour mill and I would tell you I didn't think much of it.

Q. Well, here is another statement that I find here the Interstate Commerce Commission to the point that any well-established steam railroad in the country—speaking of conditions prior to the war, I think,—but I don't know as it is limited to that,—should get their money at 4½ per cent. Is that a ridiculous proposition for a steam railroad company to be able to float its bonds today at 4½?

A. Yes, perfectly ridiculous. You would not think of anybody buying a railroad bond for 4½ if they could get a government bond at 5, would you?

Q. No, but you will admit, I think, that this 5 per cent [fol. 247] on government bonds is a very abnormal situation, and limited in its duration, is it not?

A. Of course. A person would be foolish to prophesy as to interest rates.

Q. Well, is not this a fact, that the Secretary of the Treasury today is trying as far as he can to retire these outstanding issues by certificates and other measures of short time duration?

A. Yes, they are trying to pay them up from surplus earnings of the government, by taxes and by refunding, yes.

Q. Do you know approximately the average rate of interest that the government paid on its national indebtedness in 1870?

A. Not the slightest, because the bonds were not of the same class; that was in a class by itself and sold at a high premium, where bonds paying a high rate would not bring that much, all United States bonds but one being in a class by itself.

Q. Wasn't there before the war an issue of three per cent bonds of the United States government?

A. I was thinking that the issue which came out during the Cuban war were three and a half, but I may be mistaken about that. My recollection is they were three and a half and sold at a slight discount.

Q. Don't you remember once there was a proposition reported in the papers that a Wall Street banker would take over the whole national debt of the government at 2 per cent if they could have it in an issue of fifty year bonds?

A. When did you say that statement was made?

Q. I remember that as made in 1880 sometime?

A. Those were probably the two's, with circulation privilege, very likely. At that time the debt was small and the two per cent bonds did not have the circulating privilege, [fol. 248] and sold at a premium, and it is entirely possible that they did make just such a proposition as that.

Q. With what concern are you connected?

A. The Minnesota Loan & Trust Company.

Q. Isn't it a fact that you know of large estates that had their money invested at a rate that would not bring more than one per cent?

A. No, I don't know that, unless it was a security that was in default. Of course, some of those estates come in with securities in default, where the rate is nothing.

Q. As the security and the certainty of re-payment increases, the rate of interest usually decreases?

A. Yes, it does. That is what I meant when I said that I thought the question of risk had to be taken into consideration in each particular state.

Q. Now, I will further read a statement here from Mr. Sisson. He says, "A return upon stock ought to provide for the years in which no dividend would be paid, and perhaps earnings would be accumulated for extensions and the betterment and perhaps sinking funds and depreciation. It might not always be possible to declare an eight per cent dividend annually. It might be greater some years and less others, but a reasonable assurance of an earning of eight per cent would sell common stock at par." This is a publication of 1920 and 1921. He says, "A reasonable assurance of earning eight per cent would sell common stock at par."

A. Do you know whether this man was ever permitted [fol. 249] to exercise his judgment in the purchase of a single issue of bonds or stock of the company which he represents, or whether his duties were along entirely different lines, such as publicity and public speaking?

Q. I will have to say no to that. I do not know this man.

Mr. Carmichael: Mr. Richards, may we have the opportunity of cross-examining this man whose testimony you are offering to read into this record?

Mr. Richards: Oh, you know not, but I am simply asking these questions to get this gentleman's views.

Mr. Richards continuing:

Q. Was it a ridiculous proposition that stock that would have a reasonable assurance of bringing eight per cent is unsalable at any point in the United States, in 1920 and 1921?

Mr. Mitchell: You mean salable.

A. Why, no. A stock that was not speculative would have sold at seven per cent. It all depends on the risk. You cannot set up a general case.

Q. I agree with you on that. I want you to talk about the Duluth Street Railway really, when we come down to brass tacks.

A. I would be glad to.

Q. And not comparatively a corporation in the hands of a receiver.

A. I think that is the proper way to do.

Q. I think so, too. Well, now, what is your judgment of common stock of any kind, of a respectable corporation, in the city of Duluth, that would have a reasonable assurance of bringing eight per cent a year? Wouldn't that be salable?

[fol. 250] A. Now, you are getting away from the Duluth Street Railway Company?

Q. Yes.

A. I should be inclined to think that it would, yes. I could name a great many concerns here, who, if there was an assurance of a continuation of eight per cent dividends on stock, would sell, because——

Q. I do not mean by that an absolute guarantee, or contract, but just a reasonable assurance from the going affairs of the business. That is, that it had been paying eight per cent for some years, and no indication that the situation would change to any remarkable degree.

A. I think it might, yes.

Q. Don't you think that there would be money enough in this locality to purchase unissued stock of the Duluth Street Railway Company, if there was a reasonable assurance of that stock earning eight per cent dividend?

A. Well, I could not imagine a harder test of financing than to try to sell street railway stock in the locality in which the property is located, because all of these companies have been harassed by stockholders, and by the rate-making bodies, until there isn't anybody in town, that has any money for investment, that does not realize that they are a mark, that there is not any disposition to treat them fairly, there has not been a disposition to treat them fairly. They are just a political football in most of the locations and I think the investors are not looking—there are plenty of places to invest money where you can invest it with practically entire safety, and not have to take up your paper and find that the city council has passed a resolution that is going to jeopardize your property.

[fol. 251] Q. You would not admit that your testimony and judgment is biased by a conviction that the State of Minnesota and the city of Duluth is harrassing and trying to beat the stuffing out of this poor street railway company, and not keep it in any kind of fair and decent shape, would you?

A. I don't think that it is intentional, but the result is just about that. I am speaking about the city now.

Q. Well, we are dealing with the State Railroad and Warehouse Commission.

A. Well, as I understand it, the railroad commission fixed a valuation and fixed a rate and then went one step further and fixed a fare, and that fare does not produce that rate on the valuation. Now, investors know that. You cannot keep those things covered up. It was an inconsistent decision, apparently. I do not know whether it was intentional, or why it was done.

Q. In the city of Duluth, do you know what the current rate of interest on the first mortgage loans, with fair security, is?

A. I would think that first mortgage loan for from forty to fifty-five per cent of the actual value of the property,—well located property,—would range from about 5¾ to about 6½ per cent. The choice business locations commanding about 5¾, and the outside residence loans about 6½. On top of that the borrower has to pay a commission for floating the loans.

Q. Isn't it your knowledge that there is money available, for what you would call first class business property on a five and one-half per cent basis?

A. I did not suppose there was in Duluth. We are being [fol. 252] told by our clients down east, that have been in the mortgage business for forty years, that they are getting six per cent on practically all eastern stock, and that they have no interest at all in any 5½ per cent loans here with us. I think 5¾ would be about the minimum rate.

Q. And that rate is higher, is it not, than it was in what we call pre-war or normal times?

A. Well, there has not been a very great difference in pre-war interest rates on mortgages, and present rates—less perhaps than any other class of security.

Q. Have you any notion of the reason for that?

A. Yes, I have. For instance, in the state of Minnesota, trust investments are limited to certain municipal bonds and certain mortgages and also certain railroad securities, but that requirement is so stringent that there are really no railroad securities that come up to it. They have first mortgage bonds, with a lot of trimmings, which do not exist, and it is necessary for those estates in Minnesota, and they are becoming larger all the time, to invest this money in securities that are eligible, and that makes a market for real estate loans. You understand that these street railway securities are not eligible with the savings banks where great quantities of mortgage loans go, and they are not eligible for trust investments in Minnesota.

Q. The loans are also a long-time investment?

A. Mortgage loans?

Q. Yes.

A. No.

Q. Well, how do you put it, what time?

[fol. 253] A. I think the average maturity would be less than five years. A great many loans are made at three, probably not so many at five, and some, very few, for ten.

Q. With privileges of renewal?

A. No, no, no privileges of renewal, no.

Q. But usually they are renewed?

A. Well, yes.

Q. What is the rate of money on farm loans, current in the state of Minnesota?

A. Well, I don't know that I can answer that question. Of course the Federal farm loans to joint stock banks—they come into the state and are able to sell tax exempt securities, and they have cut the rate down so it is low, but I do not think any of the mortgage houses could take the Minnesota mortgages and sell them to investors at much higher than five and a half or six per cent. I think Mr. Wakefield could answer that question better than I can. He is more familiar with it.

Q. The rate permissible under that United States farm loan law is what?

A. It is one per cent higher than the rate which the bonds bear. I think the state of Minnesota is charging on their rural credit loans six per cent. They have recently had three million dollars to loan on that class of securities.

Q. You understand, do you, Mr. Durst, that under the present law, the Brooks-Coleman Act, the street railway company have the privilege of borrowing money for not to exceed a year without the consent of the railroad commission?

A. Yes, sir.

[fol. 254] Q. And that if it proposes to issue bonds it must have the consent of the railroad commission?

A. Yes, sir.

Q. And has your testimony been influenced by the thought that the street railway company are bound, under existing contracts, so that they cannot sell bonds at all?

A. No. I tried to imagine a situation where the property was free and clear of any indebtedness, and was either being sold as an entirety, or was being re-financed.

Q. There is some evidence here that they will have to earn at least $365,000 a year to be able to float another bond issue?

A. That was not my testimony?

Q. That was not your testimony?

A. No.

Q. Do you think that is so?

A. I could not answer that question, but I would suppose they would have to earn more than that.

Q. Now, let us make a little calculation, if you please, Mr. Durst. Here is $1,200,000 of stock issued by the street railway company, and apportioned to the Duluth Division. Supposing that we give them eight per cent on that annually, that would be $96,000, am I right?

A. Yes, sir.

Q. Now, then, suppose we allowed them a lee-way up to seven per cent on any bond issue, on the bond issue outstanding two and a half, that would be $175,000?

A. That is right.

Q. $271,000 would cover all those requirements of seven per cent on the bond and eight per cent on the stock?

A. That is correct.

[fol. 255] Q. Would there be anything, in your judgment, really unfair about that proposition?

A. Well, it would be of no practical value to them from the standpoint of financing. Their hands would be absolutely tied, because, as I testified here earlier in the day,

at the time this decision was rendered by the Commission, an investor could buy the first mortgage bonds to net seven and one-half and could buy the general mortgage bonds to net nine and a quarter. Now, if you can imagine a company going out to sell any quantity of those general mortgage bonds with the market at nine and a quarter, you can see what it would cost the company.

Q. As a matter of fact though the street railway company,—do you know whether they are earning $271,000, or were at the time the Railway and Warehouse Commission made its order?

A. I think I have those figures here, but I would suggest that the officers of the company——

Q. You were aware, weren't you, that the Railway and Warehouse Commission were intending to give them $345,000 as a just and reasonable rate?

A. Well, I did not know the amount. I have not figured it out.

Q. Would you say that a rate that would give stockholders eight per cent on the stock and at the same time allow seven per cent for financing purposes, was confiscatory, as far as——

A. I would say it was impractical and that it would be impossible for the company to operate under it and therefore I would say, "Yes,"—that it was confiscatory. It [fol. 256] seems to me it is very clear to me that you could not afford to try to drive a bargain here with the street railway company that is going to tie their hands so that they cannot secure money for needed extensions, which you say you wanted to make, one of the things that will give good, adequate street car service——

Q. Mr. Durst, do you believe that we have a good progressive city here, that is bound to grow?

A. Yes. That is, I do, if you pursue a policy of fairness towards capital. You cannot grow without capital, and you cannot attract capital unless you treat it fairly, because it will go where it is treated fairly.

Q. I will say to you now, as far as I am concerned, that we want to treat this company and every other company fairly. At the same time, that is two-sided, it is not all one-sided, and it means that the people must have fair treatment, too, from an institution that comes in to deal

with them. There are two parties to any bargain, aren't there?

A. Absolutely.

Q. And coming down to the situation in Duluth. I assume that you believe, as I do, that the city of Duluth is going to grow and become a large city in the course of time and that this street railway company is here to stay and it has a monopoly. It has a monopoly, hasn't it,—as a fact?

A. At the present time, yes, sir.

Q. Can you conceive of any possibility of any competition with the street railway company coming in here, by any other street railway company?

A. No, I cannot.

Q. That thought must be based upon this, that if the [fol. 257] present one has some trouble, there is no particular invitation or inducement to another one to come in here?

A. You are quite right about that.

Q. Now, we have here,we will assume,—we have some testimony, and we will assume that the management of this street railway company is efficient and has been efficient and will be efficient. Mr. Robertson says they have a manager that is one of the most expert in the United States, and dependable. Now, then, we have a progressive city, a growing city, not one that is going back. I think in your former testimony you also assumed that we had in the city of Duluth a very high car-riding habit, shown by the proof. Do you remember that?

A. I remember your making that statement to me, and I assumed that it was correct.

Q. That is based upon this proposition, that this street railway line is peculiar. There are a great many short roads, and the outlying street railways run into the main ones on the hillside. And it is based upon evidence and the admission of the manager of the street railway company, at least, that there are 250 people riding on the street car—25,000,000—that would be 250—to 100,000 population,—a higher percentage, as the evidence shows, than exists in the city of Madison, and as far as I know as high or higher than any other city in the United States,—

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and in reference to the low cost of power, had you given that thought?

A. Well, I knew they had a contract, but I understand it has not long to run.

Q. It has till 1931, I believe, to run and I call call your [fol. 258] attention, and we are assuming in the record and from the testimony before,—it is not here yet, that in 1921—no, in 1931 it will expire—resulting in a saving of cost to the street railway company, as compared with steam-developed power, to the extent of $83,000 per year, and increasing in its value, or getting more than that as the year progresses,—now, combine these four elements: A high car-riding habit; an extraordinarily low cost of power; an efficient manager, and a progressive and growing city; and a monopoly of the street railway company, that will not be threatened by competition of any other street railway company. Isn't there an element of practical permanence in this situation?

A. Well, only in the event that the company is permitted to receive the benefit of some of those advantages. There is no advantage to the street railway company to save $83,000 on a power contract, if that all is to go to the car rider. It does not make the stock or bonds any more attractive. So that with all those elements you must have an addition to it, the ability of the company to earn and continue to earn a sufficient amount so that its securities are marketable in order that it may be able to make the extensions that you are going to get here, if your city is going to grow.

Q. Surely, but here, you recognize the intention of the Brooks-Coleman law to treat this company fairly, do you not?

A. Yes, I think it was the intention of that law to do so.

Q. In fact, don't you think that that proposition shown in that law itself had a tendency to stabilize, you might [fol. 259] say, or increase the credit of the Duluth Street Railway Company?

A. I think that the sentimental effect was favorable, and that what the banking houses and the investors will now wait to see is some practical, favorable operation of the law, in the way of increased or adequate earnings.

Q. The investor recognizes that the street railway company is no longer at the mercy of any caprice, if it ever was, or arbitrary action of any city council in Duluth?

A. Well, that depends on whether the act is repealed, or not. An attempt was made to repeal it at the last session. It is not at all impossible that it may be repealed.

Q. Well, if it did not operate fairly for the people, as well as the company, it ought to be repealed.

A. Yes, I think our city officials in Minneapolis regard it as a very fair law in its operation as to the car-rider and to the city generally.

Q. In order to have it stand and to have the respect given to it, it ought to be fair to both sides?

A. It must be, it must be.

Q. Fair in all things. Fair to the city, fair to the company, and fair to the people who are paying the fares. Now, I think that you stated that if the element of risk is eliminated or practically eliminated, that must and should lower the rate of return to any investor?

A. Yes, sir, on any kind of a security, I think I made it, I didn't say how it could be eliminated with regard to street railway properties.

Q. Well, you spoke of some competition from automobiles?

[fol. 260] A. I did that because I stood on Superior Avenue this morning and watched the number of automobiles go by with two or three or four or five people in them, compared with the street cars that were going by. Those automobiles were going in both directions. I could see how a great many people who had formerly used the street cars must now be using automobiles, and I assume that that is increasing all the time.

Q. A lot of them are tourists, are they not? And then again Superior street is rather a congested district?

A. Of course, I don't know how many of them are tourists. I thought they looked like local cars, most of them.

Q. But you don't imagine that the automobile is going to drive the street car in the city of Duluth off from the street?

A. No, I should think not.

Q. You spoke also of the possibility of other cars, one man, what did you mean by that?

A. Mr. Ford has in mind, and has been working for a long time, on a car which operates—does not need a track to operate on. It is operated by one man, a very light car, which would obviate the necessity of trolleys, or tracks, or the extent of pavement between the tracks. He feels that that is going to be the method of transportation in cities.

Q. Where is he putting that in operation?

A. No, he has not put it in operation anywhere, so far as I know.

Q. Well, as a practical business man, you would not be alarmed about all the proposed inventions that might be constructed?

A. Well, I will have to admit that I have been very much [fol. 261] concerned about this particular one.

Q. How concerned?

A. Well, I mean we have had it constantly in mind as we purchase or consider the purchase of street railway securities.

Q. Well, that, as I understand you to say, is a kind of trackless system itself?

A. Yes.

Q. Well, that has not made itself manifest yet?

A. It has not, no.

Q. And every other business in the country in a way being in machinery or any thing of that kind is subject to possibilities of improvement in the art, which would cause them in some extent to conform to it?

A. I think every business has its corresponding risk.

Q. And on the whole you would say that in your best judgment there is not very much risk about the continued prosperity of the Duluth Street Railway Company?

A. Well, when you say "continued" I do not regard it as having had any sucess up to date.

Examined by Mr. Carman:

Q. Mr. Durst, I wanted to ask you two or three questions about the hypothetical million dollars of property which you assumed as a basis for your testimony in this case. I believe that you stated that in your judgment, in order to refinance or raise the value in money of a portion of the property which, for convenience you say was of a fair value of one million dollars, that it would be the usual method to

[fol. 262] issue bonds, not exceeding sixty per cent or $600,000, and raise the balance through the sale of stock, which of course would have to be sold on such a basis as to yield par, in order to make up the total amount representing the fair value, and that in such case, in your judgment, it would be necessary, in order to do that, that the net return on the million dollar fair value, for payment of all expenses and taxes, including income tax, and after setting aside an adequate depreciation, would figure 9.3 per cent or should show about $93,000. Am I correct in that statement?

A. You are correct in your statement as to the $93,000.

Q. And you arrived at that figure of $93,000 as being twice the amount necessary to float the $600,000 bond issue at seven per cent to the investor, with three-quarters per cent charge for financing or selling the bonds?

A. That is correct.

Q. Now, suppose that the Commission did fix a rate which would yield $93,000 in our suppositious case on the million dollar property, it is a fact that the $93,000 itself would pay seventy per cent on the bond issue or $42,000 and would pay $4,500 financing expense, and would pay ten per cent on the stock issue of forty thousand dollars, and would still leave $6,500 surplus after all that was done, if the company had actually gotten the $93,000 return?

A. That is correct. I did not suggest, however, in my testimony, that this stock which was to earn ten per cent would be sold without expense. I had in mind there would be about one per cent per annum in selling that stock.

Q. Then that one per cent per annum expense in selling [fol. 263] the stock, still the $93,000 procured in this manner would still leave some little surplus over, taking care of all of that after selling the stock and paying seven per cent on the stock to the investor, and seven per cent on the bonds to the investor, would it not?

A. Yes.

Q. Now, if that condition continued for any appreciable length of time, isn't it a fact that this stock which was receiving ten per cent dividends would go up in value above par?

A. I don't really have in mind that the company would declare every nickel that it earns. I had in mind that they

would declare something less than probably ten per cent and that the company must earn at least not less than ten per cent.

Q. What I am trying to do, Mr. Durst, is to get this hypothetical figure applied to the practical side of the fixing of the rates under the law, which yields an adequate return upon the value of the property used in the public service, and I understood that you were assuming, in fixing this rate of 9.3 per cent as your judgment of what the return should be, that all other matters were taken care of?

A. Yes.

Q. That there was no part of this to be used for any other purpose, because we have set aside depreciation reserve, and have paid the taxes including the income tax, so that the people who actually owned the million dollars worth of property are getting part of it at least from that normal income tax, a return of either seven per cent on the preferred security or ten per cent from the security containing the greater risk, and isn't it a fact that if the [fol. 264] Commission prescribe a rate that yielded that amount so that the stock of the company yielded ten per cent, and that the seven per cent was paid on the bonds, that the stock of the company would appreciate very considerably above its par value, as soon as that became permanent enough to indicate to investors that they might expect that ten per cent to continue?

A. Of course, but how could you convince the investor that it would be permanent when this law may be repealed at any session of the Legislature?

Q. I am speaking only about a suppositious case and carrying out only our hypothetical million dollar case.

A. Yes. If you could convince the investor that that stock would continue to earn ten per cent for the next twenty-five years, beyond any question of doubt the stock would advance in value, although you understand that the Great Northern and Northern Pacific stock, which we think are about as good stocks as there are, pay five per cent dividends and are selling in the neighborhood of fifty-five cents on the dollar right now.

Q. Canadian Pacific. I believe there is a part of the Canadian stock which has paid ten per cent at least up to

the beginning of the war, or had paid ten per cent for a long time,—did it not?

A. I cannot answer that.

Q. And because of the fact that it did pay ten per cent for such a length of time, and investors regarded it more or less permanent, it had come to have a market value away above par, hadn't it?

A. Theoretically that statement is correct.

Q. Now, assuming that our million dollar fair value at [fol. 265] the present time, assuming that the rate prescribed by the Commission does not yield the 9.3 per cent which you deem necessary for financing purposes, the effect of that failure to yield the 9.3 per cent, depreciates the sale value of the property, of the system, if it were to be sold as a whole?

A. Yes, sir.

Q. And then doubts in the public mind as to whether an adequate return will be allowed, and as to how long it will continue, also depreciate the market value of the property below its fair value in our hypothetical case, does it not?

A. It creates an uncertainty in the minds of the investors who might be considering the purchase of securities of the company, and we have got to offset that by a higher yield.

Q. If this hypothetical million dollars fair value were placed on the market in the present condition and you were to take it, if you were bidding to purchase it, you would bid of course away below the million dollars in the present situation of the company and of the public mind with reference to the investment?

A. Well, I am afraid my imagination won't go quite so far as that.

Q. Let us put it another way: In your judgment, is the market value (if we may assume that there is any such thing as a market value for street railway systems) with the market value of the street railway system such as that of the cities of Duluth and Superior, its selling value is at the present time in your judgment far less than its actual fair value?

[fol. 266] A. Oh, unquestionably, on the showing of earnings which they are making, the property would have to be sold at a great deal less than it would be physically worth.

Q. Now, getting back to this proposition of fixing a rate that would yield a fair return, both to the public and to the investor, in our supposititious case, is it not true that if the Commission fix a rate of return which would yield seven per cent for our $600,000 bonds and seven per cent for our $400,000 stock, to be maintained with some degree of permanency, that the entire value of the property could be raised and that the bonds could be sold at par and the stock sold at par?

A. No, sir.

Q. You think it is not true?

A. No, because you see your investor would require seven per cent on the bonds and the banking house——

Q. I am assuming seven per cent net. I am assuming it would make it seven per cent to the investor after paying the bank.

A. The stock at seven?

Q. The stock at seven?

A. No, sir.

Q. If the conditions were continued on a yield such as you think would be necessary of seven per cent net to the bondholder and seven per cent to the stockholder until the stock sold at above par, then you would consider that the rate ought to be reduced on the stock—the return——

A. Well, I don't see why the company should not be permitted always to have a fair rate of return on a fair valuation, regardless of what that might be, to the bonds or the stock.

[fol. 267] Q. But a fair rate of return, on a fair valuation, in your judgment, under present conditions of the company, would be 9.3 per cent, isn't that what it was?

A. Yes, sir.

Q. And of that 9.3 per cent, it would be so used as to pay part of the people who had the money in the investment ten per cent net and the other part seven per cent—that is, to pay the stockholders ten per cent net and the bondholders seven per cent?

A. Yes. Or, if not to pay them the ten per cent, to have earned the ten per cent.

Q. I don't get what your distinction is there?

A. Well, I think that if a company like this declared every five-cent piece that it earned,—in other words if they earn

just ten per cent and declared a ten per cent dividend, I would think it was very poor management.

Q. But suppose their earnings exclusive of this ten per cent is sufficient to cover the ordinary betterment and replacement and working capital?

A. There are other elements.

Q. You still think in addition to what they should pay themselves as owners of the property, they should set aside a still further surplus, than the earnings?

A. I think any concern, I don't care what nature of business, if they declared in dividends every cent they earned, I would think they were simply headed for the rocks, because there is no business that does not develop bad years, or catastrophes and troubles, which no one can foresee.

Q. Then it is your opinion that a public utility, such as [fol. 268] the Duluth Street Railway Company, ought to be allowed a return sufficient to pay interest or dividends upon the fair valuation of its property, and set aside a surplus in addition to that?

A. Well, it seems to me I have covered that——

Q. I simply wanted to get whatever that was.

A. I thought I had made it clear that I was not necessarily talking about dividends on stock but that I was talking about the company being permitted to earn not less than ten per cent on the stock. I did not fix the question of dividends there.

Q. And you did not have in mind that that ten per cent had to be all paid out to the stockholders, then?

A. No, I had it in mind that the company must earn not less than ten per cent.

Q. And then pay as much or as little of that to the stockholders as, in the judgment of the directors, was proper?

A. To make a market for stock.

Q. And your three-quarters per cent cost of financing, in the sale of these bonds, in our hypothetical case, would that expense of financing vary according to the length of time that the bonds had to run?

A. Yes, but you cannot sell a street railway bond now, and you have not been able to for a long time, and will not be for a long time in the future,—that runs as long as your power bonds would run, for instance, or a gas bond. So you have no option in the matter as a company, you have

got to conform to the risks surrounding that kind of security.

Q. Suppose that the bonds were to be issued for $600,000 in our case and were to run thirty years. Is it your opinion [fol. 269] the cost of financing that so as to get $600,000 net to the company now, would entail the expenditure of three-quarters of one per cent of that amount during the entire thirty years.

A. It would not entail any expense at all,—you could not sell a thirty-year street railway bond.

Q. Let us place it at fifteen years, would you take it if it were ten per cent?

A. Yes.

Q. It would require three-quarters per cent every year?

A. Of course, you have got to pay this commission in cash. That is the unfortunate thing, and that commission earns interest every year, from year to year. And where the three-quarters of one per cent amounts to more than $4,500, then I figure that the actual interest prescribed here would be $4,940 and I reduced that to $4,500, just for an approximation.

Q. And in your judgment this $4,940 would keep up—the average?

A. No, no, I figured that about $4,500 would be the average. The first year it would be $4,940.

Q. So that in the fifteen years the cost of financing would have amounted to somewhere around twelve and a half per cent of the issue, the capital of the issue realized from the sale of the bonds net to the company?

A. Well, it is about eleven per cent.

The Master: May I ask you a question, Mr. Durst? Do I understand that your testimony is on the theory of a new company being organized and financed at this time?

A. Yes, this hypothetical case.

[fol. 270] The Master: Yes, the hypothetical case you gave us, upon the theory of a company being now organized, which would require an expenditure of a million dollars, six hundred thousand dollars of which would be procured from bonds and four hundred thousand dollars from stock?

A. Yes, a new clean company.

The Master: Now, have you applied those figures to this company?

A. Well, this company, as I understand it, is just in this condition——

The Master: Well, have you applied these figures to this company?

A. I don't know that I understand exactly what you mean.

The Master: With this company there is apportioned to the Duluth Street Railway Company bonds amounting to $2,519,882.

A. Well, I have not applied that because I do not see how I could, without having some idea of the valuation of the property.

The Master: Well, in your hypothetical example you assume the physical value of the property would equal the bonds and stock.

A. Yes.

The Master: Well, now, would it be very difficult for you to apply your figures to the bonds and stock of this company as actually existing, because after all we are trying an actual case.

A. Yes, but we have not the actual valuation of the property to go by. I did not build this up with regard to the [fol. 271] bonds and stocks that were outstanding on a company that started out without any debt, but I assumed that the million dollars was the value of the property. Now, I have not anything to go by to assume what the valuation of this property is. That is a matter that I understand is one of the very purposes of this litigation.

Mr. Richards: The Commission's order here puts the value on the property at practically $900,000 more than the total stock and the total bonds apportioned to it.

Mr. Mitchell: $4,600,000. Of course this stock does not have any necessary relation to the value. The stock was actually only $700,000. This company was not financed through the sale of its own stock, the company was financed through the sale of bonds and the stock of a holding com pany.

The Master: Yes, but there must be one or two ways, or possibly a combination of ways to estimate a return upon the physical value of the property, ignoring its capitalization, or estimated upon its capitalization. Now, Mr. Durst has been——

Mr. Mitchell: He is ignoring capitalization entirely.

The Master: No, he is ignoring the physical value entirely.

The Witness: Not in the hypothetical case.

The Master: Let me assume the physical value of the capitalization was the same, and with a calculation, then, based on the capitalization——

The Witness: That is right.

[fol. 272] The Master: Now, I think that ought to be followed up possibly with regard to the capitalization of this company. If it is of any value let us know what value it has.

Mr. Richards: Our claim would be upon the hypothetical statement and testimony that it demonstrates the fallacy of his claim of 9.3 per cent absolutely.

The Master: Well, I made the calculation while we were sitting here, and now if you take twice seven per cent on both the bonds and three-quarters of one per cent on the bonds in addition and then the actual rate on the bonds, it leaves fourteen per cent plus for the stock.

Mr. Mitchell: That could be worked out from time to time.

The Master: Yes, but I would like very much to have Mr. Durst's opinion on that as to what his opinion is in this particular case, because after all we are trying a practical case.

Mr. Mitchell: Oh, yes, of course we want all the information from every direction.

The Master: Mr. Mitchell, I confess that I have the same difficulty with regard to the investigation of the element of value as given in the Ames case that everybody else seems to have. But it does seem to me that we have to take either one horn of the dilemma or the other, either the question of what is required to finance the company, or the proposition as to what is a return on the physical value.

[fol. 273] Mr. Mitchell: Now, the Commission does not claim in its findings that the property is only worth the sum of the security. The Commission finds the value approximately a million dollars in excess of those securities, what we claim——

The Master: But the figure here representing the amount of return required on the capitalization, under Mr. Durst's testimony, is less than the amount the Commission found.

Mr. Mitchell: Yes, but I do not think Mr. Durst would intend to limit that to capitalization, where there was a million two hundred thousand dollars outstanding, representing $2,800,000. I understand Mr. Durst's testimony to be based on what he deems the value of the property and he is taking merely a million dollars as a unit, but would multiply that by four or five, or whatever it might be, to bring it to the fair value of the property. It happens that in this case the stock outstanding, even on the basis taken by the Commission, is practically one-half of the value that the Commission finds on the property.

The Master: Well, I am not expressing any theory about it, I am trying to get the facts, and I confess I do not understand Mr. Durst's testimony in that respect. Just as you state it, I understood Mr. Durst's testimony was that, in order to dispose of the securities of the railway company, they must yield a certain return; the physical value of the property, I imagine, might be somewhat above or below that capitalization, but, based on the capitalization it must give a certain return. It may well be that what you are entitled [fol. 274] to is a return upon the physical value of your property, which is much higher than Mr. Durst's figures. Before he leaves here I would like to see if we can come to an agreement upon the figures themselves.

Mr. Mitchell: Let me ask Mr. Durst a few questions.

Mr. Mitchell, continuing:

Q. As I understand, your testimony is based upon a return which you think is necessary upon the fair value of the property?

A. Yes.

Q. And it has no necessary relation to the amount of stock which might be outstanding in this particular company?

A. Absolutely none whatever.

Q. Or the amount of bonds or any other security?

A. No, sir.

Q. But has to do wholly with the fair value of the property?

A. Right.

Q. Now, if that fair value of the property were assumed to be $4,600,000, as the Commission found, then you would be able from that to determine what you think would be a fair return upon that property?

A. Yes, sir.

(Mr. Mitchell cites the Bluefield case.)

(Argument.)

The Master: I would like to ask Mr. Durst a question. Mr. Durst has testified here that this company is entitled to a return of 9.3 per cent on the fair value of the property. He comes to that point by saying that that amount is required, if it was a new company being organized at this time, and capitalized up to the value of the property, and for the purpose of selling all those securities including [fol. 275] the stock and bonds, that would be the amount of money that would be required: is that correct?

A. That is right.

The Master: Now, we have not that situation. We have a different situation in which a large amount of bonds is outstanding and the stock is outstanding and the company is a going concern. Now, is that the correct basis in this case to compute a return? That is a matter which I think our attention ought to be directed to and that is what I wanted to draw out by showing what the result of that computation would be on the capitalization as it exists. If you would make that computation on the higher value of the property, I think you would get still a wider spread. Do I make myself clear to you, gentlemen?

Mr. Richards: I think so.

The Master: That is the thing I want to bring your attention to.

Mr. Mitchell: Let me ask a question or two to bring it out. Mr. Durst, you heard the testimony of Mr. Robertson as to the capital requirements of the company?

A. I did.

Mr. Mitchell, continuing:

Q. Also as to the date of maturity of all of its outstanding bonds?

A. Yes, sir.

Q. So that you have in mind the capital requirements and the necessity for the funding of its obligations at maturity of those bonds, 1930?

A. Yes, sir.

Q. Now, your evidence has been based on what you thought the company would be obliged to earn in order to [fol. 276] finance itself completely and start a new business on merely a unit of the value, to be multiplied to bring it to the fair value of the property, as found. Now, I will ask you, Mr. Durst, whether, in this particular case, in your judgment the company could secure the additional capital required, as testified by Mr. Robertson, and be in position to fund its obligations when they mature, or make it earn substantially the amount that you have stated it should earn to make its securities salable?

A. Well, of course I don't know what the condition will be in 1930.

Q. Assuming that they are the same as they are now?

A. No, they could not.

Q. Unless conditions become very much better for the street railway industry, or interest rates become lower? That is unless conditions change so as to make it easier to finance the property, you think that the company must have such an earning history as you have suggested?

A. I do.

Q. In order to properly function and finance itself at that time?

A. Yes, sir.

The Master: That is, you think this company, in its situation, if conditions continue the same, would be subject to all the limitations that you have placed upon an entirely new company?

A. Yes, sir.

[fol. 277] Examined by Mr. Richards:

Q. What did you mean by "If this company's situation continues the same?" Do you have in mind its present revenue?

A. No, sir.

Q. I will call your attention to the statement of the Commission in its order, that is what we complain of. They say, Mr. Durst, using this language: "In recent months utilities have financed upon six per cent basis, and even less per cent basis." Do you agree to that as a fact, or is the Commission wrong?

A. What was the date of that?

Q. July 13, 1922.

A. Why, unquestionably many utilities had financed themselves on that basis.

Mr. Richards: But not street railways?

A. Not street railways particularly, and not the Duluth Street Railway or the Twin City lines.

Mr. Richards, continuing:

Q. They say in recent months?

A. The reference is to recent months preceding that ruling?

Q. July 13, 1922, yes. And they say, "Current rates of interest have materially declined." Do you agree to that?

A. Well, it had declined just at that time but since then it has advanced.

Q. Well, is your present testimony based upon the condition existing when this order was signed, or later?

A. Yes, at the time the order was signed.

Q. As a matter of fact there had been, you might say, an [fol. 278] extraordinary condition in the falling rates of interest from 1920, had there not, to that date?

A. Yes, but it was of very short duration.

Q. The decline, what were the limits of the decline fairly, in illustrative cases?

A. I don't think I can give you that estimate. I cannot give it to you without reference to the records.

Q. Because the rate of interest materially declined or should materially decline, you figure that that is an element to be taken into consideration?

A. Yes. But since the ruling the rates have really advanced again.

Mr. Richards: I move to strike out this testimony as subject to the objections that we have made relating to a state of facts subsequent to the date of the order of the Commission.

The Master: Note the motion.

Exception by intervener and defendants.

[fol. 279] L. E. WAKEFIELD, sworn, testified as follows:

Examined by Mr. Mitchell:

Q. Mr. Wakefield, what is your residence and occupation?

A. Minneapolis, vice-president of the Wells-Dickey Company.

Q. What is the business of the Wells-Dickey Company?

A. Dealing in investment securities.

Q. How long have you been connected with that company?

A. Thirteen years.

Q. And has it during all that time been engaged in the business of dealing in investment securities?

A. It has.

Q. Have you been connected with the brokerage business?

A. Yes, sir.

Q. Have you been familiar for sometime with the securities of the Duluth Street Railway Company?

A. I have.

Q. Did you testify in the hearing before the Railroad and Warehouse Commission?

A. Yes, sir.

Q. Did you, in preparation for giving testimony in that case, give special thought and consideration to the Duluth Street Railway Company?

A. Yes, sir.

Q. And to its securities?

A. I did.

Q. And have you, for the purpose of testifying now, given further consideration to that matter?

A. I have.

Q. You have heard Mr. Durst's testimony and the discussions as to what is a fair rate of return?

A. Yes.

Q. Will you please state to the Master and for the record the conclusions which you have reached as to what earn-
[fol. 280] ings this company must receive in order to enable it to properly function as a public utility and to place its securities with thei nvesting public under the conditions as they exist in Minnesota today?

Mr. Richards: The same objection, it is understood, will be made to the testimony of this witness.

The Master: Note the ruling and exception.

Q. I will say further, under the conditions as they existed at the time of the hearing before the Commission, and as they exist today.

A. There are certain factors which I would like to state, which I have used in reaching a conclusion which I will give as my best judgment of the requirements of the Duluth Street Railway Company, as to earnings, and in discussing the need of a return on the property of the company, I am discussing the Duluth Street Railway as it existed at the time of the former hearing, and which is the same condition existing today, and not using any hypothetical case. The Duluth Street Railway Company has been operating over a great period of years, is a factor in the growth of the city of Duluth, apparently rendering an essential service to the community. It is operating, as it has been stated in the testimony, under efficient management. The basis of its use by Duluth citizens is a maximum, practically in the use of street railway service. Its power contract is an old one. On the most favorable terms imaginable for power today, and in spite of all those facts, its history or its record of earnings is such that its securities, as are other securities of street railways, are more
[fol. 281] or less discredited with investors today, and are selling at a low price or a high yield. It is confronted with the necessity for a complete re-creation of its financial structure, and of its operating conditions. Within the next seven years, that is up to 1930, it must arrange for a refunding of its mortgage obligations, complete, and it must arrange a renewal of its power contract. The present

bonds were issued and put out at a time when we had no income tax law, and at a time when street railway properties, as such, were constant and steady earnings, and the bonds were salable at that time to large investors in large blocks. That condition has completely disappeared, since bonds were issued, which accounts for the fact that we are not discussing or referring to any street railway security being issued today on a five per cent basis. Today the big investor buys a tax-free bond, a municipal obligation, as a rule, or farm land bonds, federal land bank bonds,—that is, securities that are free from the income tax. So that the distribution of street railway securities today must be made to the so-called small investor. The general, average size of sale at the present time, so far as I know, is from $1,200 to $1,500 per investor, which in itself puts a greatly added cost on the distribution of the security, and means that the sale of the bonds must be made to a class of investor who necessarily seeks a higher return. I have figured over these necessities of the Duluth Street Railway Company, and have reached, in my mind, this conclusion, in which I have attempted to [fol. 282] be fair to the company as an operator, and to the community in which it operates. I said at the time of the hearing in St. Paul before the Commission, that I felt that the Duluth Street Railway Company would have to show an earning of approximately $425,000 per annum net, in order to be able to in any degree arrange its refunding operation, and issue the additional bonds that are necessary if it continues to fulfill the need of the community in the additional construction and development of its property. Now I say that for this reason, that if you take the present outstanding bonds of about $2,500,000, taking the present apportioned bonds, that is, the amount of bonds apportioned to the Duluth property of approximately $2,500,000, and admitting—about which I think there can be no argument—that those bonds cannot be refunded at better than seven per cent, which would mean an interest charge of $175,000, and which interest charge, if the bonds are to be salable, must be earned at least twice over, which would be $350,000. And then, admitting the necessity for approximately a half million dollars of additional bonds within the next two or three years, you would have to have

an income of from $415,000 to $425,000 to accomplish that, and that income cannot be guaranteed at the time you attempt to sell the bonds. That is, the bonds have got to be sold on past history. It has got to be shown that the company is going to be in position, because of the past years——

Q. That is, the interest must be earned?

A. Yes, or the investment dealer must be shown, before [fol. 283] he would buy the bonds, that the company is going to be permitted, under its operating conditions, to earn enough money to pay this charge, or the bonds cannot be sold. Now, it is a peculiar thing, but applying that figure of $425,000, and using Mr. Durst's figure of 9.3 per cent on the value which the Commission has fixed of $4,600,000, would bring the figure to $427,000. Now, I arrive at this conclusion in this way (and I am anxious not to make any statement that can be considered unfair to the community in which the utility is operating) and I want to emphasize the fact that I have figured out from this point of view, that the community is best served by putting their company in a condition where it can compete for money on a fair basis with other demands for money. As it is operating today, it cannot. It is a prejudiced security. It has no chance to get money at anywhere near the same return as a great many other businesses or needs can get money. And the City is best served by putting the company in a condition, in my opinion, where it can ask for money and compete in the market and get that money at the lowest possible rate. Now, I do not claim that this return must necessarily be paid forever. I do not know anything about that, but I do claim that this company has got to have approximately $425,000 of net annual return, if it is going to fulfill its obligations to this community or refinance itself with any degree of success.

Mr. Mitchell: I think you have covered all the matters that I have in mind. You may cross-examine.

[fol. 284] Cross-examination.

By Mr. Carman:

Q. Mr. Wakefield, you agree, in the main, then, with the testimony of Mr. Durst?

A. I believe that I agree with Mr. Durst completely in his testimony, with one exception. I have not figured from that method, I am not ready to say that, up to a point where conditions might be developed, that I believe a property ought to have 9.3 per cent return.

Q. Suppose it were possible to guarantee to an investor a net return which he might with certainty depend upon, don't you think that seven per cent would be a return which an investor, under such guarantee would be glad to get?

A. Oh, I think if you could get the state of Minnesota, for instance, to guarantee a return, you could use five per cent, if the state would assume the obligation.

Q. In making your esimate of the amount necessary, $425,000 per year, that does include, in addition to a return in fact upon the value of the property, a certain further return over and above that, because investors are really suspicious of all securities of this kind of utility and must have some additional inducement, above an ordinary return on the value of their money in a safe and certain security in order to induce them to invest here?

A. Now, I am assuming, in making that figure, that if these proceedings come out properly, so that the public can be given some degree of confidence that the amount of money, the earnings, would establish a basis so that within [fol. 285] a couple or three years, at an opportune time, when conditions are ripe, this company could refinance itself.

Q. But a high rate of return is in your judgment necessary as a basis for refinancing the company at a future time?

A. Yes, or at the present time. I don't think it could be refinanced today. I don't think, even though that rate was fixed today,—you would have to give it a couple of years or so to get the history back of it with the money coming in, the actual earnings demonstrated before you could refund it.

Mr. Mitchell: A mere promise or a mere representation that that might be done would not induce you to sell that bond, would it?

A. We would not be willing to undertake to sell those bonds until we felt that this community had settled down to a working basis. I would be afraid if it was established

today, that there might be some new case started next week or the week after.

Q. Then in your judgment of the working basis, that the community ought to settle down to a permanent proposition, the property might be expected to yield a return of $425,000 a year?

A. Not as a permanent proposition.

Q. Well, for how long?

A. I would not be able to say how long.

Q. Three or four or five years?

A. Certainly until they had been able to accomplish the general rearrangement of this whole situation. Then, if they found they were earning too much money I suppose [fol. 286] the Commission could cut it down.

Q. Do you think the Commission would be dealing fairly with the investing public if it boosted the rates now to 9.3 per cent? (Which is approximately the rate required on the basis mentioned, to yield $425,000) with the idea of bolstering up the public confidence in the utility, and then afterwards reducing it to seven per cent or six and a half or some other figure, upon a straight investment basis?

A. That would be all right, provided the reduction still left the company in a fair position to earn twice or more its bond interest.

Q. It is your judgment that the company ought to be allowed to earn twice or more than twice the amount of interest payable upon its bonds, irrespective of whether that amount so earned is seven or eight or nine or ten per cent on the actual value of the company's property engaged and used in the public service?

A. No, I would not go that far. I say that as things are today, and on the basis of seven per cent, and I do not regard seven per cent as being a rate that is liable to be much lower, because of the factors I have given before, of the necessity of a market for the bonds, the place where you have got to go to sell them.

Q. Well, it is a fact, reduced to its last words, that a part of this return which you would make here, of the amount necessary, is to pay the investor for his fears and distrust of the investment in this kind of security, and in addition to a normal rate, or a more desirable rate? A. No, the bond money is the cheapest money that the street rail- [fol. 287] way company is going to get for their business,

and the street railway company best serve this community when they get their money as cheaply as possible. They are going to get their money as cheaply as possible by making their bonds as saleable as possible, with all fairness to everyone concerned, and they cannot make those bonds saleable unless they can show excess earnings over the mere interest payment that looks satisfactory to the investing public.

Q. And in the frame of mind of the investing public now, do you think it is necessary to make that return in order to induce them to invest about 9.3% on the fair value of the property?

A. I say it figures out that way, the way it is on this property, but in arriving at my figures I have not considered any values. I simply considered the necessity of the case.

Mr. Mitchell: And if the value should, as we claim, be as much as a million dollars, more than that is, that would mean——

A. That much less return.

Mr. Richards: And if it was a million dollars less the rate of return would have to be boosted to a much larger figure?

A. Yes.

Examined by the Master:

Q. Have you estimated on the present condition of the company what return that would give on the value.

A. That would give just a little less than 9.3% on the [fol. 288] $4,600,000 value.

Q. Well, if you deduct from that value the amount of the bonds, $2,500,000, the interest on that is five per cent, that leaves $300,000 to be applied to the remaining value of $2,999,978.72. That would give a return of about 14%?

A. It would be right at the present amount, but the figures that you are talking about——

Q. What is that figure?

Mr. Mitchell: That is not the amount of stock.

Q. I make it 14% plus?

A. Yes, it is approximately 14%. The reason that I put that figure on it, not just knowing just exactly what it is,

is that within the next five years this company must get into condition to do its refinancing, and they are going to have some very heavy expenditures, reorganization, power contract, which will in my opinion create a very much added cost to them before they come to refund those bonds, which is in itself an expensive operation.

Q. That is up to 1930?

A. But they will have to do it within the next five or six years or they will get into the same position where the Burlington road was and get caught by four per cent bonds maturing at a time when they had to pay seven and a very heavy rate of commission to renew them.

Mr. Richards: You testified before the Commission, did you?

A. Yes, sir.

Mr. Richards: Practically the same?

[fol. 289] Irving H. Overman, sworn, testified as follows:

Examined by Mr. Mitchell:

Q. What is your residence and occupation?

A. Vice-president of the Minneapolis Trust Company, Minneapolis, Minnesota.

Q. How long have you been connected with that company?

A. Eleven years.

Q. What is the business of that company?

A. Buying and selling securities.

Q. Have you, during that period, been familiar with the general securities market in Minnesota?

A. Yes.

Q. Have you during that period, been familiar, or part of the time at least, with the securities of the Duluth Street Railway Company?

A. In a general way.

Q. You did not testify before the Commission?

A. I did not.

Q. Mr. Webb, the President of your company did testify?

A. Yes, sir.

Q. Mr. Webb is now away on his vacation?

A. Yes sir.

Q. After it was known that Mr. Webb would not be available to testify here, did you make some study and give some thought to the situation of the Duluth Street Railway Company, for the purpose of testifying on the stand?

A. Yes, in a general way, I did.

Q. What conclusion, Mr. Overman, did you reach as to the rate of return which would be necessary for this com-
[fol. 290] pany to earn, to enable it to properly function and to sell its securities in the market of Minnesota in competition with other securities that are offered to investors.

A. Well, should a public utility group come to our office, to borrow money if the loan was a fifty per cent loan and using the same basis of a million dollars, I would arrive at a figure of about 8.4 as a minimum that they would have to earn on a fair value.

Q. You, of course, do not attempt to tell what the fair value would be?

A. No, sir.

Q. But whatever that value would be, your judgment would be, that to enable it to secure capital for its extensions and to yield to its investors a return, a return that would induce them to invest in the security, the company should have a return of not less than 8.4%?

A. Yes, sir.

Mr. Carman: Mr. Overman, except in so far as you differ on this minimum rate necessary, except insofar as you differ in that from the other two witnesses, Mr. Durst and Mr. Wakefield, you agree with them. Is that substantially your judgment?

A. Yes, I do, yes.

Mr. Riches: That is, you refer to a million dollar proposition, you refer to the basis that Mr. Durst took?

A. Yes, I use a million dollars as a basis, but it does not make any difference what the figure is.

Mr. Carman: You have heard their testimony in the
[fol. 291] court of the secretarial duties, but does not take a room?

A. Yes.

Mr. Richards: That is the apportionment of bonds and stocks?

A. Yes, 60 to 40.

LYLE BABBITT, sworn, testified as follows:

Examined by Mr. Carmichael:

Q. You are a resident of Columbus, Ohio?

A. Yes.

Q. And what is the name of the street railway company operating in Columbus?

A. The Columbus Railway Power & Light Company.

Q. What position do you occupy with that company at the present time?

A. Assistant auditor.

Q. What was the condition as to age and health of the auditor?

A. The auditor is a gentleman of about seventy-six years old, not very active. He is only there a part of the time. He is also secretary of the company and takes care of the secretarial duties, but does not take care of any auditing duties.

Q. Then are we to understand as a practical matter that you are in charge of the Auditing Department of that company?

A. I am.

Q. How many years have you been employed by that company?

A. Eighteen years.

Q. And during all of the time in the accounting end of the business?

A. Yes, sir.

[fol. 292] Q. What rate of fare was in effect in Columbus during the whole of the year 1921, the year 1922 and so far in the year 1923?

Mr. Carman: Just a moment. We object to the question, any questioning along this line upon the ground that it is incompetent, irrelevant, immaterial. That it is not within the issues made by the pleadings in this action, that it is too remote, conjectural and uncertain as applied to any of the issues in this action to be of any probative force.

The Master: The objection will be noted and exception to the overruling.

Q. The question is what rate of fare was in effect in the year 1921, 1922 and up to the present time in 1923.

A. Six cents cash fare, five tickets for twenty-five cents.

Q. What is the population of the city of Columbus at the date of the last census?

A. 237,000.

Mr. Carman: May it be understood that our objection goes to all this testimony without it being reepated to each question?

Mr. Nichols: Sure.

Mr. Carman continuing:

Q. I understand you to say that the fare was six cents cash and five tickets for twenty-five cents?

A. Yes.

Q. And the population is 237,000?

A. Yes.

Q. And you serve a little bit more than that in the corporate limits. What estimate do you place upon the popu-
[fol. 293] lation served?

A. About 260,000.

Q. Referring to the year 1921 how many six cents or cash passengers were carried?

A. 4,503,705.

Q. Let me strike that question. I want to put it this way. How many ticket passengers were carried, or passengers riding at five for a quarter?

A. 62,796,015.

Q. How many passengers were carried at the cash fare?

A. 4,503,705.

Q. Now you have an owl car service?

A. Yes.

Q. That is not a ticket service?

A. No, that is ten cents cash fare.

Q. How many were answered on that owl service?

A. 402,208.

Q. Now you have an interurban transfer fare, where the fare of passengers is split between one or two companies?

A. Yes.

Q. How many interurban transfer passengers were there?

A. 361,124.

Q. The interurban transfer passengers are not at a ticket fare?

A. No, that is a five cents cash proposition.

Q. Making the total number of passengers carried in the year 1921 of what?

A. 68,063,052.

Q. What percentage to the total do the ticket passengers bear?

A. 92.26.

[fol. 294] Q. What percentage to the total do the cash passengers bear?

A. 6.62.

Q. And the owl car passengers?

A. .59.

Q. And the interurban transfer passengers?

A. .53.

Q. What was the total amount of passenger revenue received by your company during the year 1921?

A. $3,431,483.03.

Q. Making an average rate of fare of what amount?

A. 5.04 cents.

Q. In the year 1922 how many ticket passengers were carried?

A. 62,466,206.

Q. In the year 1922 how many cash customers—cash fare passengers were carried?

A. 4,825,908.

Q. How many owl car passengers were carried in the year?

A. 387,761.

Q. How many interurban transfer passengers were carried in the year?

A. 99,486.

Q. Making a total of how many passengers carried in 1922?

A. 67,779,361.

Q. What percentage to the total for the year 1922 did the ticket passengers bear?

A. 92.16.

Q. The percentage for transfer passengers?
A. 7.12.
Q. The percentage of the owl car passengers?
A. .57.
Q. The percentage of the inter*r*urban transfer passengers?
A. .15.
Q. What was the total amount of passenger revenue last year, 1922?
[fol. 295] A. $3,445,410.50.
Q. What was the average cash paid per passenger?
A. 5.08.
Q. In the first six months of 1923 what was the number of tickets passengers carried?
A. 32,224,029.
Q. The number of cash fare passengers?
A. $2,485,607.
Q. The number of owl car passengers?
A. 198,112.
Q. The number of interurban transfer passengers?
A. 41,776.
Q. What was the total number of passengers carried the first six months of 1922?
A. 34,949,524.
Q. What percentage did the ticket fare passengers bear to the total, the first six months of 1922?
A. 92.24.
Q. The percentage of cash fare passengers?
A. 7.11.
Q. The percentage of owl car passengers?
A. .57.
Q. The percentage of interurban transfer passengers?
A. .12.
Q. What was the total amount of passenger revenue for the first six months of 1923?
A. $1,771,968.30.
Q. What was the average amount paid per passenger?
A. 5.07 cents.
Q. From information furnished by you, Mr. Babbitt, this morning was an exhibit prepared numbered Plaintiff's Exhibit 31?
A. There was.

Q. Have you examined that?
A. I have.

[fol. 296] Mr. Mitchell: We will offer Exhibit 31 in evidence.
Mr. Carman: The same objection.
The Master: Received subject to the objection.
Mr. Mitchell: You may inquire.
Mr. Carman: No cross-examination.

Examined by the Master:

Q. During any of these periods did you have a situation in which you issued coupons to the passengers paying higher fare?
A. Not during this period.
Q. Have you had any experience with a situation of that kind?
A. We did back in the year 1918.
Q. Did you find that about the same number of passengers took advantage of the lesser rates where coupons were issued as where they were not issued?
A. We tried that proposition in 1918. We were operating with eight tickets for a quarter, five cents cash fare. The company attempted to give us its franchise and charge a straight five cents fare. On the advice of the city attorney the people were instructed to offer the conductor a quarter and ask for eight tickets and if the conductor refused (which of course he did) they were instructed to stay on the car and ride free. The people did this, and millions and millions of people during that period rode free. But to the ones who paid the five cents fare we issued the coupons which were good for 1⅞¢ refund.
Mr. Richards: Was that the litigation that went to the [fol. 297] Supreme Court of the United States?
A. It did.
Mr. Richards: And it was decided there that it was a contract between the street railway company and the city, and the company would be held bound by its contract?
A. That is true, this contract has later been amended and the company has been permitted to charge a five cent fare.

The Master: It appears here that under the order of the Court coupons were issued to those purchasing tickets, five rides for thirty cents.

Mr. Richards: That is correct.

The Master: But that during certain periods of time the excess between five cents and the thirty cents amounts to, in round numbers, $72,000?

Mr. Mitchell: That is right.

The Master: Which represents something more than seven cents to the passenger, one cent a passenger—what I wanted to ask Mr. Babbitt was whether he ever had any experience in that situation?

A. Well, we had just one experience.

The Master: Just as you have described?

A. Yes.

The Master: Well that is not at all similar?

A. No.

The Master: So that you have no way of expressing an opinion whether the passengers taking advantage of the coupon system as I have described it would be about in [fol. 298] the same proportion as the passengers who had purchased five rides for a quarter, if that was permitted?

A. No.

The Master: You have no experience along that line?

A. No.

At this time an adjournment was taken until Monday, August 20, 1923, at the same place.

[fol. 299] Duluth, Minnesota,

Monday, August 20, 1923—10 o'clock A. M.

Pursuant to adjournment the hearing was continued as follows:

Mr. Ivan Bowen (member of the Minnesota State Railroad and Warehouse Commission): May it be entered on the record that Ivan Bowen appeared as counsel for all defendants except State Attorney Hilton, and the city of Duluth.

Mr. Carmichael: Mr. Drum is present and is running over his report and looking at the property, and I think he

will be able to take the stand at 2 o'clock this afternoon. If we go on with Mr. Warren this morning and he is still on the stand at that time, if the other gentlemen wish us to withdraw him, we will do so and put Mr. Drum on at that time.

Mr. Richards and Mr. Carman: That is agreeable to us.

Mr. Carmichael: I want to make a statement as to Exhibits 14 and 14a, that were tentatively offered. We will ask permission to withdraw them and substitute others later. Those two were only put in tentatively with the right to withdraw.

The Master: There is no objection to that, is there?

(No objection on the part of the defendants or the intervenor.)

[fol. 300] The witness Mr. Warren was recalled for further cross-examination, but was excused for the time being.

Mr. Richards: If your Honor please, we are a little surprised at the non-appearance of Mr. Drum at this time. We were assuming that Mr. Drum would occupy the day and so we have not really prepared, or we have not taken sufficient time for conferences in regard to the cross-examination of Mr. Warren on the exhibits that he put in. We could probably readjust ourselves to the condition with a little time for a conference on the proposition. I think we might save time if we took a recess until two o'clock.

By consent of all parties a recess was taken until two o'clock P. M.

[fol. 301] Duluth, August 20, 1923—2 o'clock p. m.

Pursuant to adjournment the hearing was resumed as follows:

A. L. Drum, sworn, testified as follows:

Examined by Mr. Mitchell:

Q. Mr. Drum, what is your name?
A. A. L. Drum.
Q. Your residence?
A. Chicago, Illinois.

Q. Occupation?

A. Consulting engineer.

Q. How long have you been a consulting engineer?

A. Seventeen years.

Q. Have you in that period of time given any special attention to the matter of the valuation of street railway properties?

A. I have.

Q. Are you the A. L. Drum who prepared or under whose direction there was prepared Complainant's Exhibits one and two in this case?

A. I am.

Q. These Exhibits 1 and 2 contain the reports made by you and under your direction covering the property of the Duluth Street Railway Company?

A. They do.

Q. Will you state, Mr. Drum, in your own way, your experience and general qualification to do that kind of work?

A. I am a graduate of Massachusetts Institute of Technology, Boston, Massachusetts. Since graduation, for the [fol. 302] past twenty-seven years, I have been engaged in the business of constru-ting and operating electric street railways. During that time I have had personal charge of the construction of something over 450 miles *road with* of electric road with its equipment and also have been general manager of four systems aggregating 600 miles of road. I have been consulting engineer on operation and construction problems for such properties as the Chicago Surface Line, the Cincinnati Street Railway, the Philadelphia Rapid Transit, the United Railways of Baltimore, the Minneapolis Street Railway, the St. Paul City Railway, the Dayton City railways, and other smaller companies. I have made inventories in detail and appraisals of about thirty-five different street railways in the United States, aggregating something over 3,500 to 3,700 miles of track. The main ones are the Chicago surface lines, the Chicago Elevated railroads, the Cincinnati Street Railway Company, the Dayton Street Railway Company, the Wilmington Street Railway Company, Altoona and Johnston, Wilkesbarre, Scranton, Pennsylvania, the Minneapolis and St. Paul Companies, the Cincinnati Street Railway Company, and other companies that I have not charged my mind with. During

the world war myself and organization were consulting engineers of transportation for the United States Shipping Board and the Bureau of Housing, and planned the improvement of transportation for the twenty-eight shipyards [fol. 303] on the Atlantic coast and about forty munition plants with a total of employment, something near 600,000 workers.

Q. Have you recently been doing work in Denver?

A. Yes I have recently inventoried and appraised the Denver Tramway Company.

Q. You also did some work in Toronto?

A. I inventoried and appraised the Toronto Street Railway Company.

Q. State how the work was done, Mr. Drum, that is shown in these Exhibits 1 and 2, and I mean state the preliminaries and the directions under which you worked and the conditions.

A. It was about May 1921 that we were engaged to inventory and appraise the Duluth Division of the Duluth Street Railway system. The inventory was taken in the field in Duluth by my associate engineer, consisting of the chief engineer in charge of the work and a departmental engineer in charge of the track, main lines, buildings, rolling stock and electrical equipment. During the progress of the inventory—in fact very shortly after we had started—Mr. Gifford's force of engineers employed by the city of Duluth joined with us and checked the inventory work that had been done by us and completed the inventory of the system, so that when this inventory was completed, it was an agreed upon inventory between Mr. Gifford and myself. After that we separated and started in to determine upon the unit prices to be applied to the inventory. [fol. 304] But meanwhile there was a preliminary hearing held in Duluth by the Commission, I think Commissioner Putnam presided and requested Mr. Gifford and myself to attempt to agree upon the inventory, and to take up the question of unit prices and see if it would not be possible to reach an agreement, that we would at least report to the Commission the agreed upon items and also report the items upon which we could not agree. As I stated, we then took up the question of unit prices independently and when we were ready with our unit prices we got together

and discussed the question of unit prices, finally reaching an agreement on unit prices on the four bases that I have set forth in Exhibits 1 and 2. Those prices are in agreement up to what we termed the plant base, the exceptions being that we were not in agreement on the land, the land appraisal having been made by independent appraisers; and we were not in agreement upon certain other items in the way of expenditures not apparent in the inventory. The engineering and superintendence, the administration, organization and legal expense, the taxes during construction, interest during construction, working capital, cost of financing and going concern value.

Q. There was also a power contract?

A. Yes, and also the power contract.

Q. Now your Exhibit No. 2, which is Volume 2 of your report, contains the details of your work in connection with [fol. 305] the entire appraisal?

A. It does. Volume 1 is the report giving the summaries, for convenient handling; and Volume 2 contains Volume 1, and in addition the detailed inventory and valuation.

Q. These Exhibits 1 and 2, Mr. Drum, have been introduced and received in evidence, but nobody yet has testified that they correctly show the result of your appraisal, but is that true?

A. They do.

Mr. Carmichael: Exhibit 32 will be and is a tabulation showing the four bases upon the valuation made both by Mr. Drum and Mr. Gifford, showing what was agreed upon and what was not agreed upon.

Mr. Mitchell, continuing:

Q. Have you a copy of it?

A. I have.

Q. Was this, or the exhibit from which this was prepared, prepared under your direction?

A. It was.

Q. And that correctly shows the items that were in agreement between your report and Mr. Gifford's report, and also the items not in agreement?

A. It was.

Q. Containing all the four different bases?

A. Yes.

Mr. Mitchell: We offer Exhibit 32 in evidence. It is merely a tabulation of Mr. Drum's report and also of Mr. Gifford's report which has not yet been introduced in evidence, but which we assume will be introduced.

Mr. Mitchell, continuing:

Q. Mr. Drum, what is basis No. 1 that is numbered here, appearing on your report?

[fol. 306] A. Basis No. 1 as shown on page 1 of Exhibit 2 is the pre war cost, the estimated cost of reproducing the property as of July 1, 1921, using the current prices for the year 1915.

Q. The initials at the top, A. L. D., are yours, and B. T. G. is Mr. Gifford's?

A. Yes.

Q. Now on this first basis, the inventory of the property excluded land and material and supplies and, as I understand it, the total amount was agreed upon.

A. It was.

Q. And there is, as a matter of fact, little difference in the division and classification, but on that basis the figures there shown, 3,488,161 is the figure that was agreed upon?

A. Yes, sir.

Q. There was also agreed upon the figure, the third in the column of material and supplies, $105,787?

A. Yes.

Q. Now I notice that materials and supplies, the same figure is used by both of you on all four bases?

A. That is correct.

Q. And the same thing is true of land value?

A. Yes, the same figure is used by me on all four bases.

Q. And the same figure by Mr. Gifford?

A. A different amount, but the same figure is used by Mr. Gifford on the four bases.

[fol. 307] Q. I think maybe you have said but if so I will ask you to repeat how you got the valuation of $150,735, for your report of the land?

A. That is the valuation of the land furnished to me by the company, as having been made by the Board of Realty.

Q. You made no attempt to make any independent appraisal there?

A. No.

Q. There is an item that is included in all four of your bases, expenditures not apparent, $6,385. I think we won't go into detail on that. I want you now to cover the four different bases. You found in the books, items showing actual expenditures which are not shown in this agreed inventory as I understand, but these actual expenditures amounted to $6,385 in the books and records. Now, you have an item, or four items aggregating on this first basis, $759,795, engineering and superintendence; administration, organization and legal; taxes during construction; interest during construction; that is the comparative figure. Mr. Gifford did not itemize, but he carries $369,641 on the four bases?

A. Yes.

Q. On the working capital you and Mr. Gifford did not agree?

A. No.

Q. But each of you used the same figure; that is, you used the same figure on all four bases and Mr. Gifford used a different figure but the same one on all his four bases?

A. Yes.

Q. The cost of financing, you used different figures, bearing some relation to the values, but did not use the same figures?

A. Yes.

Q. You have an item which you call developmental costs, [fol. 308] which amounts to $1,129,935, and you compared with that an item which Mr. Gifford called going concern value, as I recall it, of $400,000. Is that right?

A. It is not exactly comparative, it is set up in this tabulation for convenience.

Q. Well, Mr. Gifford had no item which exactly compared with that developmental cost, I take it?

A. No.

Q. There was also power contract cost, on all four bases, $379,542. Mr. Gifford has no corresponding figure in his report.

A. That is correct.

Q. Now, Mr. Drum, what was the basis No. 2?

A. Basis No. 2 is the ten-year average cost, estimated cost of reproducing the properties as of July 1, 1921, using average prices, 1912 to 1921, inclusive.

Q. You and Mr. Gifford agreed upon the unit cost for the ten-year period?

A. Yes.

Q. Then, applying that, you agreed upon the result so far as the inventory was concerned?

A. Yes.

Q. But the other items remain in disagreement, as it did under basis 1?

A. Yes.

Q. Basis No. 3 was what?

A. Basis No. 3 was present-day cost being the estimated cost of reproducing property as of July 1, 1921, using current prices as of June, 1921.

Q. And on that there are the same items of agreement and the same items of disagreement?

A. Yes.

Q. All that is shown in this tabulation?

A. It is.

Q. Basis No. 4?

A. Basis No. 4 is the estimated original cost, being the [fol. 309] estimated cost of reproducing property as of July 1, 1921, using prices in effect when the property was installed or purchased.

Q. And upon that basis also there were the same items in agreement and the same items in disagreement?

A. Yes.

Q. Well, Mr. Drum, the agreed value of the inventoried property, excluding material, supplies, and the land, for Basis No 1, was $3,488,161 and for Basis No. 4 was $3,487,020.

A. That is correct.

Q. Making a difference on these two bases of the agreed inventoried properties, a little over a thousand dollars?

A. Yes.

Q. And, carried out, your grand total under Basis 1 is $6,337,561; and under basis No. 4, $5,336,093?

A. Yes.

Q. That is, your basis No. 1 is in each case a very little higher than Basis No. 4?

A. Yes.

Q. But considering the amounts involved, you reach always—it would give your estimates the same results?

A. Yes.

Q. Number one being 1915 pre-war cost, and Number 4 being the investment cost as agreed upon?

A. Yes.

Q. Do any of these bases reflect any increase of price on account of the increased values caused by the war?

A. Yes, basis No. 4 reflects some increase in price by reason of the property constructed during and after the war.

Q. Well, Basis No. 4 reaches a total result of just a little less than Basis No. 1, so that Basis No. 1 was evidently slightly higher than some of the prices that were used for the investment cost?

[fol. 310] A. I do not follow your question. There are two different bases of appraising the property and naturally they have different prices used in them.

Q. But for basis 1, you undertook, both of you, to determine when the property was purchased——

The Master: Basis 4.

Q. Yes, I have just reversed. My question is simply reversed. The 1915 prices are slightly higher than the average of all the investment prices?

A. Yes.

Q. Then taking the 1915 price as unaffected by the abnormal prices during the war, the total investment cost was slightly lower than the prices reached in 1915?

A. Well, I have not figured that out in detail.

Q. You do not need to figure it out, all you have to do is to look at the figure here, it is $1,169 less?

A. Yes, it is less.

Q. So it does not require any calculation. Then the increase, giving the average of the ten-year, would be the increase, the difference between basis 1 and basis 2?

A. Yes, that is correct.

Q. And the increase in price shown under basis 3 would show the effect of the higher prices as of that day, as compared with the prices of 1915?

A. That is correct.

Q. Now, Mr. Drum, I would like to have you briefly explain the item of $6,385, expenditures not apparent in the inventory.

A. The item of $6,385 specified as division 15, expenditures not apparent in inventory, is listed in detail on page [fol. 311] 147 of Exhibit 2.

Mr. Carmichael: Is that division 14 or division 15?

A. Division 14.

The Master: What do you mean by divisions? There is no explanation given of that.

A. On page 9 of Exhibit 2 is the summary of appraisals, and the appraisal is specified into division numbers. For instance, land is division No. 1.

Q. But on your Exhibit 1 on page 9 you will find what we are talking about.

A. These expenditures, not apparent in the inventory of physical property, in division 14——

Q. That contains on those three pages the items making this total of $6,384.61?

A. Yes.

Q. Then, will you explain in a general way about those?

A. These items listed under the head of expenditures not apparent in inventorying the physical property, are items of construction cost, customarily not encountered in building street railways, and are not ascertainable from the inventory of the property, but can only be ascertained by investigation of the books and records of the company. To illustrate, there is a payment to the City of Duluth for strengthening the viaduct over the tracks of the St. Paul and Duluth Railway Company. These items of cost are what we term ascertainable hidden costs in the construction of property of this character, and while these exact items might not be encountered in the reproduction of the property, we believe they are the fairest measure of items of similar character that would be expected to be encountered [fol. 312] in reproducing the property.

Q. And these items which you show here are shown by the books and records of the company to have been actually expended?

A. They are. I might add that these items are customarily charged to capital account when encountered in the construction of a street railway system.

Q. I suppose that in failing to include those,—do you know whether Mr. Gifford questioned the accuracy of this statement?

A. No. I think Mr. Gifford was satisfied as to the accuracy of the statement. Of course, I am speaking from memory, it was sometime ago, but I think he was satisfied that the statement was accurate, but did not think that it should be included.

Q. Why?

A. I have foregotten why.

Q. Well, in your inventory have you included this in any other items in contingencies or in any percentage of any sort?

A. No.

Q. Mr. Drum, in your report did you have the items that have been discussed as general overhead which are shown under the four headings which aggregate $759,795? Mr. Gifford's report does not contain those, divided into separate items, as I understand.

A. No, his report does not divide those into separate items.

Q. You discuss those under the headings of general overheads. Will you state, Mr. Drum, your reason for treating those separately and for giving them each the cost figure which you have given?

A. My experience is that they are separate and distinct items of cost of construction of a street railway property [fol. 313] coming under the four heads of engineering and superintendence, administration, organization anl legal expense, taxes during construction, interest during construction, and are entirely unrelated to each other in their cost, and therefore I estimate them on the basis of the individual item. The engineering and superintendence is estimated at five per cent of the cost of the physical property. That five per cent for engineering is the result of years of experience in the construction of a composite property. It is pretty generally accepted, as the final result. It varies in amount with each of the various divisions of the property, but we find that five per cent is a conservative measure of the actual engineering costs.

Q. To get at how you made your calculation in your Exhibit 32, you have taken the total inventory of the property,

the expenditures not apparent, which gives you the total physical property of $3,751,068. I find by calculating here that you have taken five per cent of that figure.

A. That is correct, and that detail is shown on page 150 of Exhibit 2. The administration, organization and legal item I find cannot be based upon a percentage of the cost.

Q. Before going into that, Mr. Drum, I think the Judge will find it easier if he sees just how this is built up, and if you will take on Exhibit 32, I see you have the totals $3,751,068 under basis 1, and the item of engineering and superintendence is five per cent of that figure?

A. That is correct.

Q. Now, then, going to your administration, organization and legal, what percentage do you use there?

[fol. 314] A. I don't use a percentage there.

Mr. Mitchell: I will call the attention of the Court to the fact that the Commission, in its order, allowed the same percentages for engineering and the superintendence.

A. The detail of that expense is shown in Exhibit 2, pages 151 to 155, inclusive, and is based upon the employees. That item would be required in the executive legal treasurer and accounting department, to administer and construct a property of this size in two years time with a six-months preliminary organization period. These detailed pages list the number of men under each department, and result in the total as shown on Exhibit 32.

The Master: It is just a shade more than five per cent, is it not?

Mr. Mitchell: Yes, it would be.

The Witness: Yes, it is just a shade more than five per cent.

The Master: The Commission allowed two per cent.

Mr. Mitchell: Yes, the Commission allowed two per cent.

Mr. Carmichael: But that figure is constant on all four bases, rather than the percentage being constant, if you will just check that over.

Mr. Mitchell: Yes, that is right, they use a different method.

Mr. Mitchell, continuing:

Q. Your figure 187,650 is the same figure in all four bases, Mr. Drum?

A. It is, for this reason, that it is based upon the 1915 period, and wages and salaries in effect, and we did not find [fol. 315] a great increase in salaries so I adopted that as a constant amount.

Q. Taxes during construction, how did you reach that amount?

A. Taxes during construction are shown on page 156 of Exhibit 2. I estimate a two-year construction period and that the fairest measure of the taxes would be one-year's full taxes for the year 1915 applicable to basis No. 1 on the 1915 basis. Similarly, the taxes for the ten-year period, in basis No. 3, are based on the equivalent of one year's taxes average for the ten years, and one year's taxes for the year 1920 apply to 1921, as 1920 was the latest amount of taxes that we could ascertain.

Q. Your taxes during construction for the three bases is the actual tax for the year 1920?

A. Yes.

Q. Do you recall how you determined the tax for the ten-year average in basis No. 2?

A. That was carried the same as the 1915 basis.

Q. A little higher, wasn't it?

A. My recollection is it is exactly the same, bases 1 and 4.

Q. Yes, but I am talking of basis 2.

A. Oh, I just testified that that was the average for the ten years.

Q. Oh, I didn't understand. Then, summarizing your bases for 1 and 4, it shows the basis of taxes paid in 1915?

A. Yes.

Q. On basis 2, it is the average of taxes for the ten years covered by that basis and for basis 3 is the actual taxes paid for 1920?

A. Yes.

Q. The Commission allowed, the Court will notice, two per cent each on basis 1—or I think the Commission allowed something more.

[fol. 316] A. Yes, the Commission's allowance of two per cent would be nearly $80,000——

Q. It would be $75,000 on basis 1?

A. —as against the $50,454 for 1915.

Q. And somewhat less than that of basis No. 3?

A. Yes.

Q. Their allowance was somewhat less than the actual tax paid for 1920?

A. Well, I have not in mind exactly what the Commission allowed except the two per cent.

Q. Yes, they allowed the two per cent of the value of $4,600,000—no, two per cent on the physical inventory which would be somewhat less than that. Now, on the interest during construction, you claim five per cent—no, the Commission allowed five per cent. How did you arrive at your figure?

A. It is shown on page 157 of Exhibit 2, interest during construction. It is based on a two-year construction period, with interest at eight per cent, estimated for one-half the two year period.

Q. You included in that divisions 1 to 17?

A. Divisions 1 to 17, excluding working capital, so that there is no interest during construction allowed on working capital. That was for the reason that the working capital carries the rate of return, but does not carry interest during construction, as the working capital becomes effective, as of the date of the beginning of operations, from and after which the rate of return is to carry the working capital.

The Master: That means eight per cent applied to the total of items from 1 to 17?

[fol. 317] A. It does.

Q. Now, the Commission, Mr. Drum, allowed five per cent on the physical inventory. First, as I understand, you think that the allowance should be eight per cent?

A. That is my opinion, yes.

Q. Explain just briefly just why you think it should be eight per cent rather than five?

A. Well, I don't know the basis for the Commission five per cent, but it is my experience and judgment that in the construction of a property of this size and character, on the basis of eight per cent interest charge, you would have full interest on one-half the money for the entire period, which is the same thing as a full interest of eight per cent

on the entire money for one-half the period. You cannot figure out in detail, and apply various methods of determining this interest during construction, but it finally comes to approximately the same result.

Q. You assume that a two-year construction period——

A. Yes.

Q. And assume an interest rate that necessarily would be paid by the company of eight per cent?

A. Yes.

Q. And on that basis, is it true, that engineers generally would allow interest upon that rate, upon half the money for the whole period or all the money for half the period?

A. That is generally accepted, but not universally.

Q. But at any rate, that is the basis you used?

A. Yes.

Q. Now, you included in that basis engineering and superintendence, administration, organization and legal ex- [fol. 318] pense, and your taxes during construction. It is a fact, is it not, that the money has to be paid out for those things as the plant is built, just as much as it does for machinery?

A. That is correct.

Q. And that is the reason you think those three items should be included with the physical property?

A. No. I include them with the physical property because in my opinion they are part of the cost of the physical property.

Q. Well, I want to sharply distinguish now between your position and that of the Commission. The Commission, on this interest during construction, allows you five per cent on the physical inventory. You have explained why you used eight per cent, but you say that it also includes these three items that the Commission treat as intangibles and overheads. What I want to get sharply is your reason for that in the record.

A. The money required for those items is expended pro rata during the construction period, and therefore they carry an interest charge.

Q. That money is paid out, as I say, just as much as the money for the machinery?

A. Yes.

Q. Paid out in building the plant?

A. Yes.

Q. Why do you fix two years, Mr. Drum, as the length of time for this kind of a job? It is based on my experience?

A. It is based on my experience that that would be as short a time as the seventy-five miles of track and equipment could be constructed in Duluth.

Q. Mr. Drum, going now to working capital, that is [fol. 319] another item that is not in agreement. The amount that you have put in for each basis is $87,312. The city engineer, Mr. Gifford, claimed $24,213 for each basis, and the Commission allowed $40,000. Now, will you explain why you have used that figure $87,312?

A. The detailed explanation of that basis for working capital is given on page 158 of Exhibit 2. It is based on two items, the having on hand as working capital sufficient funds to provide for an average of the one-half month's current operating expenses which amounts to $54,536, and funds sufficient for six months capital expenditures which amount to $32,775, a total of $87,312. That is checked by my experience that property of this size usually carries and requires to carry from eighty to one hundred thousand dollars of cash on hand. One-half of the six months capital expenditure is required, for the reason that a company of this kind could not plan its construction work and enter into its contract for material and make its obligations for extensions and the purchase of equipment, to the municipality or the public, without having at least half of the money available to do the work; and that, in my mind, is about the condition in which the companies of this size have to keep themselves in order to maintain their credit and carry on their business.

Q. Well, do you think, Mr. Drum, that the amount that the city claims in its evidence, or which the Commission has found, or even $30,000 would be sufficient for this company to keep it in good standing, good credit at the bank, and with those with whom it deals?

A. As I remember it, the Commission excluded $32,775 of funds that I had estimated would be necessary to have [fol. 320] on hand for one-half of the capital expenditures, and that the allowance of $30,000 is comparable with the amount that I estimated of $54,536 to be on hand on account of the operating expenses. I don't think that that amount

of $30,000 would be sufficient. I have examined a great many companies and when I find a company with a cash balance that low, I realize that it is in a pretty weak condition, relatively that low.

Q. Mr. Drum, another item that you did not agree upon is that of cost of financing, on basis No. 1 and basis No. 4, your cost of financing is substantially the same and somewhat more in each of the bases, 2 and 3. Will you explain how you arrive at that item? A. The basis for cost of financing is given on page 159 of Exhibit 2. The cost of financing represents the cash paid to bankers or underwriters as compensation for their services and expenses in securing the funds required to reproduce the property, and is estimated at five per cent on the cost, or all costs comprising divisions 1 to 19 inclusive.

Q. What do you base that estimate on,—on experience?

A. I base that estimate on general experience that on the average the difference between the prices at which securities are sold to the bankers or underwriters, and the price at which the same securities are sold to the public, about five per cent, which represents the compensation to the bankers. I distinguish this from bond discount, which I might illustrate in this way. That if the securities were sold at 90 to the banker and at 95 to the public, those five points would represent the cost of financing, and the remaining five points between the 95 at which the banker [fol. 321] sold to the public, and the par of the security, would represent the bond discount—the distinction being that the first five points represent an immediate cash outlay in the way of expenses incurred by the bankers, and their profit, in the marketing of the securities.

[fol. 322] Q. Those amounts would be paid direct to the banker out of the proceeds of the sale of the bonds?

A. They would. They would be the same, relatively, as if the company attempted a campain of selling these securities at their own offices, where they would have to employ skilled investment men and salesmen, the rental of space, and the usual advertising and publicity campaign. The bond discount, the remaining five points, is not a cash outlay at the time of construction, but it is a promise to pay the five points upon the maturity of the security.

Q. So that, in your accounting, you would in some way amortize the bond discount; but the other, being paid out at once and direct to the bankers, you think should not be amortized?

A. Yes.

Q. Now, you think that the rate of five per cent is probably the minimum to cover the banker's commission and expenses?

A. Yes, sir.

Q. I think we would probably be lucky, if we could finance the Street Railway Company on that basis today.

A. I agree with you.

Q. Mr. Drum, in your comparative statement, you have itemized developmental costs in the sum of $400,000 which was treated by Mr. Gifford in his reports as going concern value, or going value, and that compares, as I understand, with the item of $500,000 which was allowed by the Commission as going concern value.

A. What compares with that?

Q. Your so-called developmental costs. In this, you have set out nothing under the separate head of going concern value.

A. My developmental cost as set forth in Exhibit 2—that is not compared with the $500,000 of the going concern value found by the Commission. I have set forth the historically estimated facts as to developmental cost of the property, and have not, in this appraisal, expressed an opinion as to the going concern value of this property.

Q. I understand.

A. I merely set out, for the Commission's information, [fol. 323] historical facts and estimated information that I could find, relating to the development costs of the property.

Q. Where is that found in your report?

A. That is found on page 11 of Exhibit 2, and the text on pages 6 and 7 of Exhibit 2.

The Master:

Q. Well, that is the item which appears here as development cost?

A. Yes. I think I ought to explain, Your Honor, that my experience with commissions is such that I find that

they have their own methods and ideas upon going concern value of public utilities, so that I have never undertaken to give an opinion to a Commission as to the going concern value of a street railway property. I have tried to present to them the facts and data, so as to inform them of everything that I could, in aiding them to form an opinion. So, I do not want to have this confused or compared with the finding of the Commission of $500,000 as the going concern value of the property. I find that commissions are just as expert and well informed on going concern value as any of us are.

Mr. Richards: In other words, you do not call that going concern value, or having any connection with going concern value, or intend to express any opinion to the Court, or point out to the Commission what you think they should find?

The Witness: I would be very glad to explain it and express an opinion to the Court on going concern value of this property, because I feel that that is proper evidence.

Mr. Mitchell: Well, Mr. Drum, in our Exhibit 32, which furnishes the comparison, the only figures that you have, or the only figure that Mr. Gifford had that would in any way compare with the developmental costs is the figure of $400,000, to be used as going concern value?

A. I thought I had explained——

Mr. Mitchell, continuing:

Q. Well, just answer that, and see if I have not stated it [fol. 324] correctly?

A. They do not compare.

Q. Then there is nothing that compares with your developmental costs in Mr. Gifford's report?

A. Well, that is a question that I cannot answer. I can explain what those developmental costs in the detail mean.

Q. Well, he is offering an exhibit here, and we are trying to follow it up, and in that exhibit we are comparing $400,000 that you have with $1,129,935.

A. I explained that that is placed there for convenience.

Q. All right then, we will keep it there for convenience. Now, on page eleven of your report you have itemized these total development costs. The commission says, under

the discussion of going concern value, that the company is contending for an addition to the physical value of the present property, used and useful in the business, certain sums aggregating $693,688 for expenditures or investments in property, which is not now in existence. Then they discussed the thing further. That is under the head of "Going Concern Value." Now will you explain to the Master those items aggregating $693,688, because those the Commission refers to specifically under this heading, on pages 38 and 39 of the Commission's reports.

The Master: I think we all understand that, Mr. Mitchell. Mr. Drum gave these items under the head of developmental costs, and the Commission have allowed $500,000 going concern value. And Mr. Gifford says $400,000 going value. The witness says they cannot be compared, but I think we understand.

Mr. Mitchell: Yes, I think we do, too.

Mr. Mitchell, continuing:

Q. Do you find upon the books and records that there was a total expense, for equipment at the time of [fol. 325] your inventory which had become obsolete and for construction which had become obsolete, as itemized here, $692,688?

A. Yes.

Q. Then you have also given an item, cost to unify the system, $50,000, is that itemized in your report?

A. It is.

Mr. Richards: To save the record, if the Court please, the City of Duluth would enter an objection here to any of this evidence on the ground that it is irrelevant, immaterial and incompetent, as forming any legitimate evidence of rate base,—comprising past losses especially those so remote as 1890 or earlier, no proper basis being laid to introduce such evidence.

The Master: The objection will be noted and the testimony will be taken subject to the objection.

The Witness: The details of the cost of unifying is shown on pages 238, 239 and 240 of Exhibit 2, as an estimate of the organization expense of creating and consolidating

the predecessor companies of the Duluth Street Railway Company.

Q. You have itemized in some detail there your estimated amounts aggregating $50,000. There were actually five different companies whose property was finally merged in and is now owned by the Duluth Street Railway Company?

A. Yes.

Q. And in your report you take up each of those properties and show somewhat in detail your estimate as to the cost in connection with its organization and leading to its acquiring its property by the present company?

A. As I have stated, it is the estimated cost of creating and consolidating the underlying companies, and it is a part of the cost of reproducing this property, in my opinion.

Q. The additional item of developmental cost is loss of [fol. 326] interest during operation. State briefly how that item is arrived at.

A. That item is described on page 7 of Exhibit 2. It represents the estimated deficit of return on the investment during the early period of operation, up to the time that the business has become established. This loss of return is estimated to be equivalent to one year's loss of interest at 8% on the investment. It is based upon what it would cost in my opinion to place the existing physical property in successful operation. It should not be confused with loss of return—the amount of expenditures would be the same in either case, and in my opinion are the fairest measure of the cost of establishing the business. In either case, the amount of cash required for those expenditures must be provided by the owners of the property. That is in the nature of an addition to the interest during construction. Now my estimate on that is 8% of the cost of the physical property. At times we estimate it at something less than one year's operating expense. That item is comparative in part with the going concern value as reported by Mr. Gifford, and found by the Commission. In addition to that cost of placing the physical property in operation, in my opinion there is an added value to a street railway of this kind, due to its having reached

the seasoned stage and passing through the term of the developmental period of the property. I know of no way to measure the cost of that developmental period today. I should first wish to ascertain that a property of this character has passed through a developmental period. Therefore, I go to the historical records of the company and I find that it has passed through the horse car period, the early electrical period, and the single truck cars. I find that it has gone to the civic improvement period where it lays tracks that are down for three years or five years or ten years, and those tracks are superseded before [fol. 327] the end of their useful life by the very reason that the street railway system has induced a growth along those tracks and created a demand for paving. Now when I have ascertained that a property of this kind has gone through that developmental period, I am satisfied that it is reasonable to suppose that in the reproduction of this property there will be a similar development period, not of the same character as experienced in the past, but I therefore feel that there is an added value over and above this eight per cent that I am speaking of, that should be fairly included in the going concern value of property that has passed through the developmental period. Therefore, in determining my judgment of the going concern value of this property I would take into consideration the 8% that I estimated to be the cost of placing the property in operation. I would take, for instance, the $50,000 that I have estimated is the cost of creating and consolidating the predecessor companies, and I would add to those amounts a sum which I would feel would be fairly representative of the added value in this property because it was seasoned and had passed through the developmental period.

Q. And you did not, before the Commission, give any estimate as to any going concern value, assuming that that was for them to determine?

A. No, I gave no estimate.

Q. Now we are before the Court, and we would like to ask you, in view of your knowledge and examination of the property and investigation of its cost of development, what, in your opinion, is the going value, or going concern value, of this property, which should be added to the other elements of value and become part of the rate base?

A. Considering my knowledge of this property, I would give the Duluth Street Railway, Duluth Division, a going concern value of $800,000.

Q. That figure would compare exactly with the figure of [fol. 228] $500,000 allowed by the Commission as you understand it?

A. Yes.

Q. And of $400,000 mentioned by Mr. Gifford in his report?

A. Yes.

The Master: Is that in addition to all of the items given on Exhibit 32, Mr. Drum, or is it absorbed in those items?

A. That excludes the item of developmental costs given on Exhibit 32.

The Master: All of it?

A. All of it.

Q. Through your exhibits you have no where mentioned going concern value but have everywhere confined yourself to what you thought to be the cost of developing this property?

A. I have tried to report the facts as I found them for the benefit of the Commission.

Q. Now, in your opinion, giving effect to all of the history of the company and to its present condition, you think that a going concern value, or the added value of the property by its being a going concern, instead of the $400,000 mentioned by Mr. Gifford and the $500,000 found by the Commission,—you think that item should be $800,000?

A. Yes.

By the Master: Well now, let me see if I can understand that. In Exhibit 32 there is an item of developmental cost which on the first basis if $1,129,935, and that amount is increased in your basis No. 2, and again in your basis No. 3, and basis No. 4 gives $1,129,826. Do I understand you that the details of that item appear on page 11 of Exhibit 2?

A. That is right.

The Master, continuing:

Q. Do I understand that you now say that that item should be stricken out and that we should substi-ute for it $800,000 going value?

A. Well not stricken out—eliminated. It amounts to the same thing.

[fol. 329] Q. And the $800,000 going value substituted for it?

A. I have never given any opinion of going value—until today.

Mr. Mitchell: I understand Mr. Drum would not eleiminate from the evidence those items, because he thinks that that expenditure actually took place.

The Master: Well it should be eliminated from the amount to be included in the rate base, and to take the place of it the sum of $800,000 representing going value, should be substituted.

Mr. Mitchell: That is right.

The Witness: I would like to state that the detail on page 11 and the study of the facts and knowledge of the property and other properties are what aided me in my conclusion as to the $800,000.

Mr. Carman: And do we understand that that $800,000 estimate of going concern value is to be substituted as the testimony or opinion of the witness in finding that rate making base on all four of the estimates?

The Master: I so understood it.

Mr. Mitchell: Yes, I understood it that way.

The Master: Is that your testimony, Mr. Drum.

The Witness: No. It is my opinion of the going concern value of the Duluth Street Railway property today.

Mr. Mitchell: Well, whatever valuation is found, Mr. Drum thinks that that amount should be added as one of the items, so that takes the place of the $400,000 of Mr. Gifford and the $500,000 of the Commission, but the developmental cost item remains in the evidence. That is not stricken from the evidence and the detail of that is found in the exhibit.

Mr. Carman: Well, do we understand that that $800,000 going concern value was different at some other time, in the opinion of the witness?

[fol. 330] The Witness: It might have been entirely different seven years ago.

Mr. Carman: So that that estimate then, of going concern value would have nothing to do with any one of these bases except that one which gives the cost today or the average upon which you might get the cost today?

The Witness: Not at all. I do not know upon what basis of fair value of the physical property the determination will be made today. But, to whatever fair value of the physical property is determined, in my opinion $800,000 should be added for the going concern value of this property.

Mr. Carman: Would you add this $800 going concern value if you were entering an item of going concern value on basis 1 in Exhibit 32.

The Witness: Basis 1 is a fact, in my opinion, and if the fair value of the property was found today to be the total of the physical property as shown on basis 1, I would add the $800,000 as going concern value.

Mr. Carman: Now would the same thing be true of basis 2?

The Witness: If found today that the fair value of the property was determined with basis 2 as the yardstick or basis 3 or basis 4 as the yardstick, in my opinion, there should be added $800,000 for the going concern value of the property.

Mr. Mitchell, continuing:

Q. Mr. Drum, on Exhibit 32 is shown an item, cost of power contract, which is shown as constant in all your bases, and for which no comparative figure is shown in Mr. Gifford's report. You undertake to show by this statement, as I understand, the actual cost of power to the company, and the Commission found a value of $110,000 for this same item. This is page 10 of Exhibit 2. Now will you explain fully, Mr. Drum, the method which you used in determining [fol. 331] that the power contract cost street railway $379,541.53?

A. This power contract runs into 1931 and power was delivered under the contract in 1907. Under the provisions of the contract, the street railway company was required to keep the old steam generating station in condition for emergencies until the power company, the Hydro-Electric Company demonstrated its ability to furnish all power required. The street railway was released from its obligation by an amendment to the contract which was dated May 25, 1914 and the plant was completely abandoned by June 13, 1916. This power contract, made effective in the delivery of power about sixteen years ago, effects a very large saving in the cost of power to the street railway com-

A. All of the property was inspected in the field, and the actual existing depreciation was determined for each of the component parts of the property and applied to those parts, resulting in that per cent condition of 86.02, which you have just stated?

Q. I am not sure whether it is figured out on a percentage basis.

A. It is not carried out on a percentage basis but the commission have carried it out.

The Master: Well you have the exact amount on page 7.

A. Yes. My recollection is that the Commission's figure, given on page 42 of the printed document, is correct.

[fol. 334] Mr. Richards: Is that going to be in evidence? It is referred to in the testimony, this instrument, page 42?

The Master: Page 42 is the printed report.

Mr. Mitchell: The Commission's report is attached to our complaint. We are making reference to it continually, with the understanding that the Commission will introduce a certified copy of its own report. It is attached to our complaint, and is admitted in the pleadings.

Mr. Carmichael: It is a part of our case. I was going to offer it the other day and Mr. Carman said they had a certified copy which they were going to introduce.

Mr. Mitchell: I don't know as it is necessary to introduce it. It is attached to the complaint and admitted in the answer. Still I think it should be introduced in evidence and if they do not offer it we will, but may we understand now you have a certified copy?

Mr. Carman: Yes. We have a certified copy which we plan to offer.

Mr. Mitchell: Would you mind offering it now?

Mr. Carman: It is not in the court room.

Mr. Mitchell: Well, just so we don't overlook it, that is all.

Mr. Richards: What I was thinking of, these pages might be misleading when we come to refer to the actual document.

Mr. Mitchell: Well it can't mislead, because it is under the discussion of the power contract by the Commission.

The Master: This figure I find of Mr. Drum, on page 7 of Exhibit 2 in which he gives the total amount of depreciation, that being deducted——

Mr. Mitchell: $513,855?

The Master: Yes.

[fol. 335] Mr. Mitchell: If we take the physical property on that basis?

The Master: Let us find out what per cent that is, $513,855,—the physical property given in basis No. 1. The Commissioner says it is 86.02%.

Mr. Mitchell: We will certify that.

Mr. Mitchell, continuing:

Q. Have you recently examined the property since you have been here, this time?

A. Yes, I looked the property over yesterday.

Mr. Mitchell: There were one or two other items we want to ask Mr. Drum about, but we would rather wait until you have completed your examination.

Mr. Carman: May the record show that our objection previously made and stated at length, to the introduction of testimony concerning the condition and affairs of the property since the time of the hearing before the Commission applies, so far as I know, to this testimony just given, and particularly since this testimony relates to the condition per cent of the property in 1923, which was not a matter before the Commission, and which we contend is not material.

Mr. Mitchell: He did not testify to its present condition.

Mr. Richards: He has not yet, but we are anticipating that you will ask him.

Mr. Mitchell: We did not ask him that question, we carefully avoided it.

The Master: Gentlemen, I understand that, without any special objection being made, it is understood that the Commission and the city of Duluth object to any evidence relative to construction occurring after the making of this order.

Mr. Richards: That is the spirit of it.

Mr. Carman: Yes, that is it.

[fol. 336] The Master: I don't know whether that extends to the receipts and operating expenses or not. I think there is a very marked distinction between the two questions, but as to a question of value or physical condition, I can very

well understand how your objection would have great force. But the actual experience of the company with reference to the operating expenses and the receipts, it seems to me has always been allowed to be considered. But your objection is proper enough to go to the whole point.

Mr. Richards: As I understand it, our objection was intended to cover everything as the Court stated, subsequent, even to the question of subsequent expense in operation, and it struck us as a particular reason for objection. We want to object.

The Master: I think it is fair for me to say, while you are all here, that I have been rather impressed with the result of the coupon system. I don't know whether either side wants to go into that as to how the total number of passengers carried during the time—what the result of the coupon system would be.

Mr. Mitchell: Our evidence in the Exhibit shows that.

The Master: I want to say while everybody is here, as I understand it the exhibits show, taking the whole month of September—I think you said the system goes into effect on the 8th of September.

Mr. Mitchell: The coupon system—I think that is so.

The Master: And if you take the whole of September, your total up to the first of August this year, of 23,000,000 people carried, a matter of 7,279,000 were represented by coupons.

Mr. Richards: That would represent just so many passengers.

The Master: That is what I mean. Of course, there is the first eight days of September included there, which you have not included. But roughly speaking, that would [fol. 337] be 31 per cent of the passengers purchased five tickets at a time. Now, Mr. Babbit's estimate was something over ninety per cent—Mr. Babbitt, from Columbus.

Mr. Mitchell: Well, so far as we are concerned, there is no additional evidence that we want to offer that it was the actual fact, the exact number. We will point out in the application of that why that would have no bearing in determining how many people would take advantage of the Commission's rate. We must bear in mind, two things, first that the person who now buys five tickets for thirty cent- is not presently saving any money at all. If he bought

five tickets for twenty-five cents, he would be now saving five cents. That is number one. Number two is, that he is buying, speculating on the outcome of a lawsuit, and he must retain his coupons, and accumulate them, and they are not worth anything unless the company loses in its attack upon the order. So that our contention will be that the experience of Columbus, where the man who bought, when he bought, saved five cents is immeasurably of more importance than our experience here when*re*, when a man buys, he does not save anything, but he merely speculates on the outcome of this lawsuit, and if he still is here, and saves his tickets, and all, he will get the rebate. With all those things to consider, nearly one-third of them are going to the trouble of buying the coupons, and saving them, when they may be of no value at all, when they do not make any present saving at all, and they will be of no value in the outcome, unless the company loses.

Mr. Carman: I believe the figures stated by the Court are perhaps a little liberal. The facts are that it is twenty in one, and thirty in the other.

Mr. Mitchell: The exact figures are shown on the two exhibits which we have.

The Master: I have not given the exact percentages. I [fol. 338] have just estimated roughly.

Mr. Mitchell: One is Exhibit 11, which shows that during the entire year 7,291,230 passengers bought coupons, for the year. During that period there were 25,404,341 carried.

Mr. Richards: I might call attention to the fact that the order amending the interlocutory injunction in the federal court, which was filed August 24, 1923, provided that beginning with midnight of the 7th day of September, this coupon sale, of tickets, would begin. So it began on the 8th of September, 1922, so that the item of 7,299,000 must necessarily be for somewhat less than eleven months.

The Master: Ten months and some days.

Mr. Mitchell: The only thing that we have failed to show would be the net number of passengers during the period.

The Master: The only thing that you have failed to show is the net number of passengers carried from the 8th to the 30th of September, inclusive, of 1922. If we have that, we can find the exact number of passengers.

Mr. Mitchell: We will get that.

Cross-examination.

By Mr. Carman:

Q. Mr. Drum, in your last statement, converning the depreciation—the depreciated condition of the property, in your report on depreciation, it gives consideration to wear and tear only, but not to obsolescence.

A. I did not find any obsolescence on this property.

Q. So that, not finding any obsolescence, you simply took into account the wear and tear.

A. I took into account everything that in my opinion affected the depreciation of the property.

Q. Now, going back to your estimated cost of the power [fol. 339] contract, and to the steam plant which was discarded when that contract came into being, or as soon thereafter as the terms of the contract permitted, in figuring your valuation of this steam plant which was then discarded, did you make any allowance for depreciation at the time—that the use of the steam plant was discontinued, or do your figures contain total cost?

A. No, I did not depreciate the plant for the purpose of getting at the cost of the contract.

Q. Do you know whether or not the depreciation reserve of the Street Railway Company at that time had sufficient money in it to cover this cost of the power plant?

A. No, I do not.

Q. Is it not a fact that at the time this power plant was discarded, it had then simply become obsolete, because the power plant was substituted for it, and it was in the same class as the other obsolete property?

A. No.

Q. What is the difference between the situation then and the situation with reference to obsolete property generally, that is abandoned or discarded, to make away for any improvements.

A. It depends entirely on what you mean by the use of the expression "obsolete." Property is abandoned or superseded for a great many different causes.

Q. In your judgment, this steam power plant does not come under any of those causes?

A. I have not expressed any judgment. The steam power plant was abandoned for the purpose of economy, and the

saving in the cost of power by reason of the power contract in my opinion amply justified the abandonment of the steam plant. That is the reason why I included it in the value at the cost of the plant.

Q. Now, what is the difference between that situation and the situation, for instance, with reference to horse cars which have been shown here in the development cost, horse cars and power, and horse car equipment were discarded because a new and better thing could be substituted for [fol. 340] them, were they not?

A. Horse cars were abandoned primarily in order to increase the speed of transit, local transportation, and of course, cleanliness.

Q. The cost of transportation per passenger would be greater by horse power, than by the present day methods, wouldn't it?

A. I am sure I could not tell you. I have forgotten.

Q. Going now to your item of developmental costs, as shown on Exhibit 32: Do we understand you to testify that these same figures contained in Exhibit 32 were presented as evidence to the Minnesota Railroad and Warehouse Commission in the hearings which it conducted for the purpose of finding a valuation and fixing a rate of fare as shown in this order of July 13, 1922, involved in this action?

A. They were.

Q. And do we understand your testimony now to be that, as to the developmental costs item, you did not intend that to be taken in its entirety as part of your estimate of what the rate-making base value should be?

A. Yes. I so testified at the other hearing.

Q. You so testified before the Commission?

A. Yes, that this was a measure of value, and illustrated the developmental costs that the Street Railway Company had encountered and that it might encounter similar costs.

Q Did you indicate in your testimony before the Commission any other figure which the Commission could use in considering your estimate of the total value of the property, except this development cost figure which——

A. I did not testify as to a figure on going concern value. I presented those facts and estimates as I found them for the Commission's consideration.

Q. Then the grand total figures on this Exhibit 32, so far as the Drum estimate is concerned, are not intended to be exact as an estimate of the business and value for rate-making purposes on the property of the plaintiff?

A. No.

[fol. 341] Q. Going back now to the matter of working capital, and your estimates of $87,312 as a proper amount of working capital, did you find in your examination of the books of the company that the average working capital during the several years preceding such examination which the company had in fact used, was around $30,000?

A. Not that I remember. If you are referring to the cash balance, I could not testify exactly on it, whether the cash balance ran under $30,000, or over $30,000, and whether it included all of their balance. I do know that the cash balance in the last two years has run $80,000 to $100,000, but I cannot recall now exactly as to the cash balance in prior years.

Q. Was that the two years up to this time that you are speaking of now?

A. Yes.

The Master: You say for the two years last past it has been over $800,000?

A. Yes.

The Master: That is the cash bank balance, the average bank balance?

A. My recollection is that the average bank balance ran pretty close to $80,000 in 1921 and 1922, and I think is running higher than that the first six months of 1923.

Q. Considering now your item of $334,138, under Basis 1, for interest during construction, and your statement that this amount is arrived at by figuring 8% upon physical valuation of $3,751,068, plus the other items immediately preceding your interest on construction. I will ask you whether or not 8% is not a pretty high rate of interest for money during the pre-war period to which this basis refers?

A. No, I do not think it is, for a property of this size.

Q. Now, I notice that in your estimates on page 10 of Exhibit 2, concerning the power plant proposition, that you used a 6% basis for figuring interest from September 13, 1907, to June 13, 1916. If the 6% basis was good for that, [fol. 342] why is it not sufficient for this item of interest

during construction for *this item of interest during construction* for this other period?

A. Because that was for cash, not risked in any street railway venture; cash that could be banked or placed in a trust fund; therefore, I used the lower rate at that time.

Q. You think that the interest rate on the money during construction ought to contain not only the prevailing commercial rate for money not so invested, but also an additional amount because it was being invested in the property of the business?

A. Why, because it was being risked in a street railway venture.

Q. Well, you did figure upon the salvage for the steam power plant; that has been risked, hasn't it?

A. No, that represents the actual share that the owners of this property would have gotten out of the sale of that power plant. And the cash would not be risked in the street railway venture, but would have been turned over to them to be used as their bank or trust funds, and that is why I used a lower rate on it.

Q. In other words, notwithstanding the fact that during the period of construction the money being invested was being voluntarily invested in the enterprise, you think it ought to carry an interest higher than the regular prevailing rates for money not so invested?

A. The money is in the enterprise in the form of materials and labor, in the process of construction, and is at a very high point of risk.

Q. Do you know, in fact, whether this particular company paid any taxes at all,—referring to your item for taxes during construction? Do you know whether or not this particular company paid any taxes at all on its property during the period of construction?

A. I could not tell you about the period of construction years ago. I do know that they pay taxes on properties of this kind during the period of construction.

[fol. 343] Q. That is, you base your estimate of $505.04 for this item upon the general custom that is known to you, rather than upon specific information as to this company?

A. No, I base it on the fact that this company pays that much money for taxes on its personal property, and that I do not see how it could avoid paying the improvement tax upon its property during construction.

Mr. Carman: That is all.

Mr. Richards: The City of Duluth will further cross-examine, but the hour is late, and I assume that we will adjourn at this time. I prefer to examine in the morning, rather than now.

At this point a recess was taken until the following morning, Tuesday, August 21, 1923, at ten o'clock, a. m., at the same place.

[fol. 344] Duluth, Minnesota,
Tuesday, August 21, 1923— 9:30 a. m.

Pursuant to adjournment, the hearing was resumed in the above entitled matter, as follows, with the same appearances:

Mr. Mitchell: May I ask just one question of Mr. Drum, which was overlooked?

Mr. Richards: Surely.

A. L. Drum, recalled, testified as follows:

Mr. Mitchell: Mr. Drum, your report, and the report, of Mr. Gifford, which are compared in Exhibit 32, all have to do with values up to June 30, or July 1, 1921. I think there has been no testimony as to the trend of prices from that day to this. Have you, in your work, kept in touch and been familiar with the trend of prices, in so far as they affect street railway properties from June 30, 1921, to the present date?

A. I have.

Mr. Mitchell: Will you state briefly what that is?

Mr. Richards: We object to that, on the part of the City, if the Court please, because it interjects new elements touching the question of the value of the property as at the present time, and we think that it is incompetent, rather irrelevant and immaterial to the issue here which is an attack on the Commission's order of the date of July 13, 1922, because of the fact that the rate established is confiscatory upon the valuation fixed on the property at that time, and not at any subsequent time; and in amplification would say that when, yesterday, they were approach-

ing the question of the present condition of the property, its actual condition of depreciation, it was at once noticed that was injecting a new element relating to a date that was [fol. 345] not taken into consideration by the Commission; and this is the same.

Mr. Carman: The Commission joins in the objection.

The Master: The objections will be noted, and the testimony will be taken subject to the objection, with exceptions allowed to the objecting parties. This particular testimony, it seems to me might have an effect as to prices or values as they existed at the time of the Commission's order, as showing the drift of prices.

The Witness: Why, I have made an estimate of the change in prices that has taken place since July 1, 1921 up to the present time as affesting the cost to reproduce the Duluth property, and I find that, as of the present day, the increase over pre-war prices is about 55.8 per cent; that as of December 1922 the increase over pre-war prices was 59½%; as of April 1922 the increase was 55.7 per cent. The figures as of July 1922 were not made in detail, because I had not made a valuation as of that date. But from my knowledge of the trend of prices between April 1922 and December 1922, the increase as of July 1922 falls somewhere between the 55.7 per cent of April 1922 and the 59½% of December 1922.

Mr. Richards: The dates are December 1922—in 1920 or 1921?

The Witness: 1922.

Mr. Richards: And all the dates you give are 1922?

The Witness: Except the present time—1923. The "present time" is July 1923.

Cross-examination.

By Mr. Richards:

Q. Are those estimates made on the basis of the weight [fol. 346] average of all commodities?

A. No, they apply to street railways exclusively.

Q. Can you give a detail of that?

A. I have arrived at that by the increases I have found in valuing other properties in the various divisions, such

as track, rolling stock and overhead lines, and applied that result to the Duluth system.

Q. I understood you to say, Mr. Drum, in answering Mr. Mitchell's question, that you were comparing with these present days the increase over the pre-war prices stated as of 1915?

A. Yes.

Q. Now, going back to a continuation of the cross-examination of last evening, I will ask you if you know the date of the installation of the equipment of the abandoned power plant as to which you testified yesterday?

A. I have not given it specifically, but it is between 1893 or 1894 and 1920, if I remember correctly.

Q. You are sure it was not after the reorganization of the company, the installation of that plant?

A. I have not charged my mind with the date of the reorganization.

Q. Might it have been before the reorganization?

A. Well, I think the reorganization was about 1900. I do not clearly recollect so——

Q. Yes. And didn't they have it at that time?

A. —so there was some installation before 1900.

Q. It was somewhere then, as I understand you, between 1893 and 1900?

A. I have not a record, but I recall 1893 and 1900 as being the dates during which that plant was installed.

Q. It might have been installed in 1893?

A. It was partly installed in 1893.

Q. To what extent, you do not know?

A. No.

Q. Then, at the time it was dismantled in 1915, it had been in use, in whole or in part, for twenty-two years then?

A. It had not been in use the latter part of the period, [fol. 347] after the hydro-electric plant came into service.

Q. That was what date?

A. The hydro-electric power was delivered first in 1907.

Q. And you would say that the power plant remained absolutely not in use from 1907 to 1915?

A. I think not, but I don't recall the extent to which it was used.

Q. What would you say was the estimated useful life of such a plant, in years, proper and reasonable?

A. It would be difficult to say at the present time without a knowledge of the exact condition of the plant back in 1914 and 1915.

Q. Well, would you say that approximately 20 years would be a fair, reasonable life for such a steam power plant?

A. No. It would be very much longer than that. In fact, the steam power plant—depending upon its economy of operation—can be used and maintained for very many years.

Q. How many would you say would be reasonable, you are speaking about a general theory, based upon your general experience?

A. Yes. That is a question I am unable to answer. I personally have seen reciprocating engines that have been in service 65 years, and I have seen electric generators that have been in service between 32 and 34 years, and still in service now, so that——

Q. And you have seen others that played out in much less time?

A. No, I have not. That is where this hypothetical theory of the age of apparatus is not supported by the facts.

Q. Well, is there any rule on that subject?

A. There is no rule.

Q. Any rule taken into consideration by actuaries or estimators?

A. There is no supportable rule to take into consideration [fol. 348] by appraisers. It is all guess work on their part, when they attempt to establish a life of a specific unit.

Q. Some may be superior in quality to others of the same manufacture, you might say?

A. Well, not necessarily. That would be incidental, of course. Some may be more carefully maintained than others.

Q. Yes, that is right. Now, would it be a reasonable supposition that something should be marked off each year for depreciation for the use of such a plant as that?

A. Yes.

Q. Beginning in 1893?

A. Yes.

Q. And what would you say would be a reasonable mark-off for depreciation beginning with that year?

A. Well, I don't like to tell you what I think should have been marked off in the plant in 1893 because I don't know.

Q. All right.

A. But you have got to set up a certain amount for depreciation, and our experience is that that changes from time to time with the conditions as we find them.

Q. All right. Do you know whether anything was marked off from the value, actually for depreciation, during those years from 1893 on?

A. No, but I do know that the company wrote off part of the plant at the time that they abandoned it.

Q. And that appears from your examination of its books?

A. Yes.

Q. Could you state what they did mark off for that?

A. No; not from memory.

Q. Did you, in thinking of this item in your testimony yesterday, take into consideration the fact that they were earning and paying dividends during any portion of this period of the life of that power plant?

A. Why, I knew from my investigation of the records of the company, that the company had not earned a fair [fol. 349] return, a sufficient amount for depreciation.

Mr. Richards: I move to strike that out as not responsive, if it is permissible. I do not think it is responsive.

The Master: I do not think it is responsive.

Q. Did you examine the financial records of the company for the purpose of showing what earnings it did make, what were available for dividends, what dividends were paid, and a detailed study of operating expenses for the year which you covered in your reports? Was that a part of your business?

A. I examined the general financial results of operations of the company for the purpose of ascertaining if they had earned a fair return.

The Master: I suppose you examined them for the purpose of ascertaining what the result had been, did you not?

A. Yes.

The Master: I think that is a better way to put it.

Q. Did you ever make any estimate of what ought to be the normal operation, under the normal operation of the property, what should have been accumulated as a sufficient depreciation reserve against the abandonment of that property, the power plant?

A. Well, I did not make that specifically except to this extent, that 100 per cent of the value of the power plant should have been earned to retire it when it was retired.

Q. But what percentage was earned, you do not know?

A. Yes, I do know what was earned by this company.

Q. To retire that particular property?

A. To retire all of that property. I did not segregate this particular power plant to the results.

Q. You don't know, then, whether the depreciation reserve was, under proper normal operation, sufficient for [fol. 350] the retirement of the whole value of the plant?

A. I know that it was not sufficient.

Q. Did you know to what percentage it was not sufficient?

A. I cannot give you the figures offhand, but my analysis of the earnings of the Duluth Street Railway Company showed me that there was a very large deficit of the earning a fair return in their depreciation.

Q. Supposing there was that deficit, should that deficit be amortized over a period of years, to be taken care of in operating expenses, say, for the coming years, subsequent to 1915?

A. I do not know as I understand your question.

Q. Well, I will change it. Supposing there was a deficit, what would be a proper mode of disposing of it from 1915 on, under the normal fair operation of the company?

A. The hope that you could make it up out of the earnings of the future years.

Q. That is right. Would it all come out of the earnings of the first year?

A. No.

Q. It would be fair, then, if there was such a big deficit, to amortize it?

A. It would be fair, but——

Q. And proper?

A. —but hardly possible.

Q. Now do you know as a matter of fact whether the deficit which you say did exist, although you do not state what amount it was, was taken care of through the earnings of the company subsequent to 1915?

A. No. There had been sufficient earnings of the company to pay a fair return and take care of its current financial situation during those years.

Mr. Richards: I don't think that is responsive. I object to it on that ground.

The Master: I don't think it is responsive. I think what is a fair return, Mr. Drum, is a matter of law, and you, in [fol. 351] testifying to the conditions, should give the amounts and not your conclusions as to what is a fair return. I have no power to rule on the testimony, but I do not think that is responsive.

The Witness: Very well. I am glad to get your point. If you will read the question I will answer it along that line.

Q. (Question read by reporter, as follows:) "Now, do you know as a matter of fact whether the deficit which you say did exist, although you do not state what amount it was, was taken care of through the earnings of the company subsequent to 1915?"

A. In my judgment, it was not.

Q. Don't you know, as a matter of fact, didn't your examination of the books show you that the company paid, in 1909, $50,000 in dividends?

A. I don't recall what the dividends were.

Q. And in 1910, $145,000.00?

A. I don't recall what the dividends were.

Q. Do you deny that that was the true fact?

A. No.

Q. And shown by the company's books?

A. No.

Q. And that in 1911 they paid $166,000.00 in dividends?

A. I have not charged my mind with those figures.

Q. And in 1912, $165,000.00?

A. The same answer.

Q. And in 1913, $142,000.00?

A. The same answer.

Q. And in 1914, $156,000.00?

A. The same answer.

Q. And in 1915, $102,000.00?

A. I do not recall the figures.

Q. And in 1916, $53,000.00?

A. I make the same answer.

Q. Assuming that that is true, how would you account for 1916, that the dividends had jumped off 50 per cent, from $102,000.00 in 1915, to $53,000.00 in 1916? Didn't that have some relation to the changes in the books growing out of this power plant in some way?

A. Not that I know of.

[fol. 352] Q. Aren't you aware, from examination of the books of the company, that they earned for dividend, the sum of $234,426.82 in 1916?

A. I don't recall the figures, and I haven't them with me.

Q. Do you deny that that is a fact?

A. I could not testify that it was. I do not deny it, of course.

Q. And that in 1917 they had a revenue available for dividends of $236,103.23?

A. I do not recall the figures.

Q. Now, assuming that those statements that I have asked you and as to amount of dividends and amount of revenue available for dividends is true as shown by the company's books, is it your opinion that that deficit that you spoke of existing in order to replace the original cost of the power plant, ought not to have been disposed of and marked off from the company's books long ago?

A. Yes, it is my opinion, because it is my opinion that the amount of capital stock upon which the dividends were paid, does not represent the full value of the property.

Q. Well, a comparison could be made between the amount of the stock and what you consider the fair value of the property and still leave a very large margin?

A. Not as far as I know.

Q. Assuming that these figures that I gave you are true, facts shown by the history of the corporation——

Mr. Mitchell: Assuming this to be true, Mr. Richards, and accepting the valuation found by the Commission, you have not in any case gotten earnings of 6 per cent in any one year.

Mr. Richards: Well, earnings would mark off a deficit, wouldn't they, anyway? And Mr. Drum, you bear in mind, won't you, that this corporation, during all these years, was not operated under the rule of fair value and return on fair value, but under contract, under contract by which they were limited to a fare of five cents,—you know that [fol. 353] to be a fact?

The Witness: That is a legal matter that I do not feel competent to express an opinion on.

Q. Well, what do you think about the difference in the rule applied up to 1921, when they were operating under an agreement of five cents, and a rule since, where they are entitled to earn a fair return on a fair value of the property? What about that difference, in your judgment?

A. I am not competent to pass upon the legal aspects of that rule.

Q. Calling your attention, Mr. Drum, to Plaintiff's Exhibit 32, and the line beginning with "developmental costs," and the figures "1,129,935," under the column of "Basis Number One," carried out under an increased sum in "Basis Number Two," and a further increased sum under "Basis Number Three," and another sum under "Basis Number Four": I understood you to say that you eliminated entirely, and intend to eliminate that line from the consideration of the Court in this case?

A. I did not say that, that I recall.

Q. Perhaps I do not state it exactly, but your idea was that it should not be considered?

A. No.

Q. Then what was your idea?

A. I stated, or I intended to state, that I reported in the appraisal the historical facts as I found them for the information of the Court and the Commission, and that this developmental cost as reported was of that nature, and that when I gave you my opinion of the going concern value of the property, that $800,000, in my opinion, eliminated the line of "Developmental Costs."

Q. Yes; all right.

A. And I wish to state that in my appraisal I report throughout costs, as I find them, not values; meaning that I [fol. 354] am endeavoring to give to the Court and the Commission the facts as I find them on the various bases, and I do not report those in my appraisal as values.

Q. And you did say yesterday that you did not intend that this line here we are speaking of, developmental costs, was to be the basis of an estimate of yours, for rate-making purposes?

A. I told you yesterday how I considered elements that went to make up developmental costs in arriving at my conclusion.

Q. Well, didn't you state that in the language that I used, approximately?

A. Will you read the question?

Q. (Question repeated by reporter:) "And you did say yesterday that you did not intend that this line here we are speaking of, developmental costs, was to be the basis of an estimate of yours, for rate-making purposes?" Didn't you so state definitely?

A. I don't think that states it clearly.

Q. Well, my question is, Didn't you say so yesterday?

A. I don't recall the answer, and just what you mean by the word "basis," there.

Q. I am just wanting to know whether you did not use that language yesterday?

A. I don't recall that, no, sir.

Q. I have noted that as the exact language that you gave, or approximately so. All right. Now, I call your attention, Mr. Drum, to a transcript of evidence in the hearing before the Railroad Commission of the State of Minnesota, held January 10 and 11, 1922, and to page 35, volume 2 thereof, and read you this language and ask you if this was your testimony in that case: "Q. Do you consider it just at this time that the general public should pay an increased rate of return in order to make up for the former years of this property from 1890, such losses as they in-
[fol. 355] curred during this period?

A. I would consider it just to pay a return of the fair developmental cost of this property, by which I mean a fair going concern value of this property." Did you use that language at that time?

A. Well, shall I speak from memory or refer to the records?

Q. Either.

A. (Witness refers to the record.)

Mr. Carmichael: That is not the complete answer.

A. Yes. I used that language, and in that answer——

Q. All right. Yes, if you did that is enough to answer the question.

A. I think that the complete answer should be put in the record.

Q. Well, I am going to follow that up. And then did you use the following language, a little subsequent, without any intervening statement, to-wit: "I present these figures here to show that there was a developmental cost incurred in this property and which I feel first was that the developmental cost existed, and second that is one of the fair measures of the going concern value of the property." Did you use that language?

A. I did.

Q. Now yesterday you said that your present view is that $800,000.00 was the fair going concern value of this property, and I understand you to say as of the date of the Commission's order, or now—I don't remember which——

A. My statement was at the present time.

Q. Well, I ask you, is there any difference in your opinion as to the amount of that going concern value between the estimate made at the present time and the date of your testimony before the Commission?

A. No. My opinion would be the same as given then and now.

Q. Or as of the date of the order of the Commission?

[fol. 356] A. It would be the same as the date of the order.

Q. Isn't it a fair assumption that your statement to the Commission was that the developmental cost was the fair measure of the going concern value of the property?

A. No. I think you have got to read the entire testimony on the case on that subject. You will note this expression, which says: "It is one of the fair measures of the going concern value of the property."

Q. It does not say one of the fair measures. It says one of the fair measures of the going concern value of the property.

A. Well, that is not correct. It shows by this that that was measures.

Q. And you had previously stated, hadn't you, in referring to the fair developmental costs, by which you mean a fair going concern value of the property——

A. No; I think you have to read the entire testimony, then you will find the same opinion as I have now.

Q. Well, didn't you state any other basis of the fair going value of the property before the Commission, except the developmental costs, did you?

A. The developmental costs are made up of the three items as reported to the Commission.

Q. Well, you mentioned no others, did you?

A. I mentioned cost of placing the property in operation.

The Master: You will find that on page 11, if you are looking for the three items.

The Witness: I stated—I mentioned the cost of placing the property in operation in my testimony before the Commission.

Q. The three items were what?

A. The three items were expenditures for obsolete equipment and construction, $693,688.00. Cost to unify the system, $50,000.00. Lost interest during operation, $386,247.00. [fol. 357] Q. Making a total of $1,129,935.00 for Basis Number One?

A. That is correct.

Q. Did you mention any other item as a basis for going concern value before the Commission?

A. I mentioned the cost of placing the property in operation, which is the same as loss of interest during operation. I explained each of those through the testimony, and it has to be read complete to get the correct analysis.

Q. Well, I am willing at any time, Mr. Drum, that you should complete it, by reference to what you said on that subject before the Commission. Having stated that before the Commission, you base your testimony on those three items as present in that figure of $1,129,935.00. I will ask you now why you change that presentation and make it $800,000.00?

A. I have not changed the presentation.

Q. You stated in the testimony that I have just recited from, before the Railroad Commission, that this developmental cost, as I understand it, was a measure—a fair measure,—and by which you mean the fair going value of the property. Well, what is your measure that you use now to determine the fair going concern value of the property at $800,000.00?

A. I stated that it was one of the fair measures of the going concern value of the property, and as I stated before you have to read the entire testimony.

Q. I know, but I am asking you now what is the measure that you use in reaching the figure?

A. Yes; and I am answering your assertion that I made a certain statement in the record.

Q. I do not wish to misrepresent your testimony nor prevent you from correcting it and putting it right. Nothing [fol. 358] can be gained by that. I want to be perfectly fair with you.

A. You will find in the testimony that what I have stated as to reporting costs, not values,—you will find in the testimony what I stated as the developmental cost for obsolete equipment and construction as being a fact, that it was incurred, and an indication of what street railways encounter in their developmental costs. And you will nowhere find that I stated that the $1,129,935.00 was the going concern value of this property. I expressed no opinion on the going concern value of the property. I reported the historical costs as to expenditure for obsolete equipment and construction. I reported the historical records as to cost to unify. I gave a judgment as to the loss of interest in placing the property in operation. I expressed no opinion as to the going concern value of the property.

Q. Well now that is all right, Mr. Drum, but now I ask you what measure have you used or did you use as a basis for the statement and opinion of about $800,000.00 as the present going value of the property and the going value of the property as of the date of the Commission's order?

A. As I stated yesterday, I took into consideration the loss of interest during operation of this property being the measure of the cost of placing the property in operation. I took into consideration the cost to unify. I took into consideration the developmental costs that historically were incurred, which proved to me that this company had gone through a developmental period and on the basis of those considerations I formed the opinion that $800,000.00 was the fair going concern value of the property.

Q. Now, if I remember your statement just made correctly, you stated that you took into consideration the his-

[fol. 359] torical records of this company as to cost to unify the system—do you mean that?

A. As shown individually, in detail, in Exhibit number 2.

Q. Well, wasn't that purely theoretical?

A. It is an estimate of the cost based upon the best facts that I could ascertain.

Q. Then you don't mean to say that that was a historical record of actual cost to unify the system?

A. I do not intend to say historical record of the actual cost, "Historical record of the cost to unify" as estimated by us.

Q. Well, that was a misuse of the words.

A. If I said a historical record of the actual costs that is a misstatement.

Q. You allow, don't you, in your theoretical statement, $3,000 for legal fees for taking over the Park Point property?

A. Exhibit 2, page 239, sets forth the estimate of the cost to unify the system, and there shows the estimate of $3,000 for the legal expense and so forth for organizing the Highland Improvement Company.

Q. Do you know in fact what was the actual legal expense, for instance, of taking over the Highland Park property as a historical fact?

A. No. That is an estimate, as I stated on the exhibit.

Q. As a matter of fact, the attorneys' fees charged in that matter were $250, weren't they?

A. I don't know that.

Q. Doesn't the record show it?

A. I don't know what the records show.

Q. The earnest money was 2000, general mortgage bonds $40,000.00, and the balance of the expenses such as consulting engineers, attorneys' fees, traveling expenses, attorneys' fees $250.00 making a total of $43,534.66 in 1917; isn't that the correct record, for taking over the Park Point property?

[fol. 360] A. That may be the correct record of the taking over, but it does not include the cost of organizing that property.

Q. Well, isn't that the cost of unifying the system so far

as the Street Railway Company swallowed up the Park Point property?

A. No.

Q. That is what they paid for it and that is the incidental expenses connected with it?

A. Well, you are speaking of the Park Point Traction Company-

Q. Yes.

A. That does not include the creation of the Park Point Traction Company as an individual company, and that is what this item includes.

Q. No; but it takes over, as an historical record of the actual cost of the Duluth Street Railway Company in following up and merging the Park Point Street Railway Company, does it not?

A. I don't know what your record shows.

Q. You don't say that those figures are not correct?

A. No.

Q. Whereas, in your estimate on page 239, you put in the figures at original cost $42,500, $50 state incorporation fee, engraving stock certificates $85 and legal expense, and so forth, $3,000.

A. What I have included in cost of unifying the system, for the Park Point property is the state incorporation fee of $50; engraving stock certificates $85; other legal expense of organization $3,000, a total of $3,135.

Q. That is right. That is all theoretical?

A. That is my best judgment of the cost of organizing that company which became a part of this system.

Q. And it is not a historical record of what the Duluth Street Railway Company expended in taking it over and unifying, is it?

A. No. It is not intended to cover that.

Q. Now, referring to your page 239, referring to the [fol. 361] Highland Improvement Company, you have used there the same expression, "Legal expenses, $3,000.00." Now you don't know what the legal expenses connected with the taking over of the Highland Improvement Company were?

A. I did not include the legal expenses in the taking over of the Highland Improvement Company.

Q. Well, it is under the head of the cost of unifying the system?

A. Yes.

Q. What do you mean by cost of unifying the system if it is not merging the other corporations already existing?

A. I mean exactly what I said on page 239, that out of the original cost it was required to pay the state corporation fee, the cost of printing and engraving the stock and bond certificates and such legal and other expenses in connection with the original incorporation. And it is the expense in connection with the original incorporation of those companies.

Q. I will admit that your heading is: "Incident to the creating——

A. This has nothing to do with the legal expense of the Duluth Street Railway Company in taking over these properties.

Q. I see. In other words, you are, in this matter of going concern value of the Duluth Street Railway in this case, taking into consideration the original developmental costs and costs of organization, all the constituent elements that now form the Duluth Street Railway?

A. The original cost of organizing the five predecessor companies.

Q. Now supposing that one and all of these constituent elements, the Highland Improvement, the Park Point, the Motor Line Company, and every one were so profitable, up to that date, that they *were* turned over their property as a gift to the Street Railway Company, and in fact that practically all these various companies were to be relieved [fol. 362] from their outstanding obligations, would you think it fair to include all their original costs, although they did not get it out of the property when they sold it?

A. In reporting the historical fact of the developmental costs of the Duluth Street Railway Company I think it is proper to show that record.

Q. Then really your estimate here made on pages 238 and 239 have no relation to the actual facts as to the expenses of the Duluth Street Railway Company or its actual cost in unifying its system?

A. Not the expenditure of the Duluth Street Railway Company; it is an estimate of the expenditures for in-

corporating and creating the incorporation of those five predecessor companies and shows the historical cost of that class of development.

Q. Now again, in regard to this Duluth Street Railway Company itself, on page 239, you have figured here the legal expenses $25,000.00 and that is a part of the $50,000.00 that you express as an estimated cost to unify the system. Do you know what the actual legal expense of the Duluth Street Railway Company was up to the time of its completed merging of all these constituent elements?

A. No; that is an estimate.

Q. Now referring back to Complainant's Exhibit 32 and to the item of expenses during construction on the Basis Number One put at $50,454.00. Have you that?

A. Yes.

Q. Is that based upon actual fact or mere estimate?

A. As shown on page 191, Exhibit 2, that is based on the taxes paid for the year 1915.

Q. Estimated or actual?

A. Well, my recollection is, as near actual as it could be gotten.

Q. Well, you say that that is actual.

A. That is my recollection. I would have to refer to the [fol. 363] detail to be positive because it is some time ago. When it was made it was intended to be actual.

Q. But you are not now clear where it is or not?

A. Well, I can verify it for you.

Q. I wish you would do that.

A. I will have to go to the company records.

Q. Well, in reference to that item of interest during construction in Complainant's Exhibit 32, page 1, $334,138.00, that is a theoretical allowance, isn't it, based upon consideration of the organization of such a corporation as the Duluth Street Railway Company?

A. That is a theoretical estimate of the amount of interest during construction.

Q. It had no reference to the actual historical record, or the manner of development of the Duluth Street Railway Company in fact?

A. No.

Q. I was referring to the theoretical statement of percentages, including interest during construction, in connec-

tion with engineering and superintendence, administration, organization, and so forth, on Exhibit 32. That estimate had no reference to the actual manner of original installation and consecutive growth and the real actual history of the development of the Street Railway Company?

A. No, it has not.

Q. For instance, in the early stages it built up a mile or a mile and a half of track and ran a mule-car over it and would gradually extend and change it, and you don't know whether interest during construction—whether any interest was paid or not?

A. I don't know from the records of the company that interest was paid, but it is obvious that it was paid.

Q. Nor how much?

A. No.

Q. And whether it was not charged off in operating ex- [fol. 364] penses from the earnings in their early—or later times?

A. It is not customary to charge it off in operating expenses.

Q. But that would depend on whether there was a bond out, or not, or any interest, as a matter of fact, or temporary loan?

A. Interest is not charged to operating expenses.

Q. Not on a funded debt, but how about temporary loans?

A. It is not charged—interest on temporary loans is not charged to operating expenses.

Q. But you don't know whether it was done so by this company or not?

A. No.

Q. Coming down to the question of working capital: In the valuation of the Superior division of this Street Railway system as a whole, leading up to the decision of the Wisconsin Commission made May 28, 1923, you testified, did you not, Mr. Drum?

A. I did.

Q. And you covered the question of working capital there?

A. I presume I did. I don't recall distinctly.

Q. And there was an apportionment and comparison as between working capital required for the Superior division and the working capital required for the Duluth division?

A. I don't remember the detail now.

Q. Do you remember your claim for the amount of working capital for the Superior division representing about 23 per cent of the total?

A. I do not recall the detail.

Q. Do you think the Commission was wrong in its order, reasoning on the basis of the income of the Duluth Street Railway Company being cash, collected at the time of the service, from each passenger, as compared with other companies who extend credit from fifteen days or thirty days or longer before their bills are collected?

[fol. 365] A. If I did not think that the Street Railway Company should have working capital, I would not include it in the appraisal.

Q. No, but I would not hardly expect you to agree with the Commission when they cut down your estimate, of course, for working capital. You claim in your Exhibit 32 $87,312.00. In your opinion should there be any different method of treatment of a company that gets its income in cash, from a company that does not get its income in cash, but has to wait for it?

A. Yes, there should be.

Q. Is there any difference that should be given in the treatment of a railway company getting its revenue in cash, from that extended to electric utilities who don't get their revenues in cash?

A. Yes, there should be.

Q. Is it or is it not a fact that in handling electric utilities it is the custom of the Commission not to extend beyond one month's operating expenses?

A. Do you mean electrical utilities?

Q. Yes.

A. I don't think there is any established precedent on it by commissions.

Mr. Richards: That is all I care to ask now.

Cross-examination on part of Commission.

By Mr. Carman:

Q. Mr. Drum, there are one or two matters which I did not get quite clear in your answers, and one of these related to this opinion that $800,000.00 is the present going

concern value of the property of the plaintiff. Did I understand you to say that you come to the conclusion that this $800,000.00 of going concern value is based upon your item of developmental costs as the basis?

A. No; I said that I considered all of those historical facts and estimates in connection with it, but I did not [fol. 366] state that it was based upon the development of costs as a basis.

Q. Was it based in part upon that item of developmental costs set up here in Exhibit 32 as a basis?

A. I will go through it again if you wish. The basis of the use of the expenditure for obsolete equipment and construction was to give the facts that this company had passed through a developmental period and indicated to what extent the cost of development had been incurred in the past, and indicates to me that similar costs of development would be incurred in placing this property in operation. The cost to unify indicated to me that the Company passed through a unification period. The loss of interest during operation I have explained fully is the cost incurred in placing—is an estimate of the cost incurred in placing this property in operation. That cost would be incurred at the present time. The other costs would not be incurred, but similar costs would be found in the development of this property.

Q. Your eight hundred thousand dollars' estimate, then, is based upon three things, one, the cost of unifying the system; two, the loss of interest during operation, putting it into operation; and third, the development costs as set forth in your Exhibit 32; is that what I understand?

A. No. That is not the way I stated it.

Q. Is the cost of unifying a part of the developmental cost item?

A. It is a part of the historical development cost item.

Q. That is, it is a part of the item you have set up in Exhibit 32?

A. As historical development cost.

Q. Yes. Then that is not a separate basis for any part of the $800,000, all it is, it is included in your develop- [fol. 367] mental cost item or historical, which you set up in Exhibit 32?

A. It shows me that this property went through a unification period and at a cost, and I have considered that, in

the going concern value of this property, should be considered the fact that a property of this kind goes through a unification period.

Q. What I am trying to get at is to get more specifically where you get the $800,000.00, whether or not you get it all from your historical development cost or whether you take into consideration other factors besides that, and if so, what other factors besides that and how much of the $800,000 is attributed to it?

A. I don't know as I can explain it much more. I have repeated it at least four or five times.

Q. Well, that $800,000.00 is not based entirely upon the items set up in Exhibit 32 as developmental costs being in basis one, $1,129,935.00 as stated, and agrees with the exhibit in the other three bases?

A. I thought I made that clear several times. It is not based on those items.

Q. Is it based in part on those items?

A. Well, shall I repeat that answer over again?

Q. Yes. I have not got it yet.

A. If you are asking me. Is my going concern value of $800,000.00 based upon the expenditures for obsolete equipment and construction of $693,688 under Basis Number One, my answer is No.

Q. So that we mark out that part of the developmental costs as not being considered in your estimate of going concern value?

A. I can but repeat that historically I found that this property went through a developmental cost in that amount and consequently it led me to believe that this property would go through a developmental period and I considered that in arriving at my $800,000.00.

[fol. 368] Q. What part of your $800,000.00 is based upon that consideration, approximately?

A. I cannot state definitely how much of the $800,000.00 is based on that consideration. In my opinion, the cost of placing this property in operation would be not less than $650,000.00. The remaining $150,000.00 I should allow for the additional cost for the development of this property in the going concern value.

Q. With reference to this cost of the power plant which was discontinued and abandoned when the power contract came into use, would it not be a fair method of arriving

at the value of the power contract at any time, to take the books of the company and take the balance which had not been charged off by the company as cost of the steam plant, taking all that the books of the company showed at the time as the cost of the steam plant, at the time the power plant was substituted,—would not it be fair to take that and amortize it over the time that the power contract had to run, in order to arrive at the value of the power contract at any particular time?

A. Not unless there was returned to the owners of the property the amount that they sacrificed in abandoning the power plant.

Q. Regardless of whether it had been charged off of the books or not?

A. That would not make any difference.

Q. If the company had not only charged it off the books, but had on hand in depreciation reserve an amount equal to the amount charged off the books, then would the method which I have stated be a fair way of arriving at the value of the power contract?

A. Not unless what you have stated operates in result to return to the owners of the property the sacrifice of the [fol. 369] investment in the power station made in connection with this power contract.

Q. Well, if the amount in depreciation reserve for that purpose was equal to the amount charged off the books, that would necessarily result in returning all the investment to owners, wouldn't it?

A. No.

Q. Why not?

A. You would simply have to determine whether the depreciation reserve would return to the owners of the property the depreciated value of the property. You are taking a hypothetical question, without determining whether the depreciation reserve——

Q. Well, you have set up your estimate of the cost of this power plant all of the items of cost that you found entering into it, haven't you?

A. Yes, all that I found.

Q. Well, if the Company set aside for depreciation reserve on this account and had on hand—we will say, to make it hypothetical—one-half of that amount, might that

not be considered as equivalent to having paid the investor his half?

A. Not unless they earned it.

Q. Well, they have got it, haven't they?

A. I say, not unless they earned it.

Q. But you mean unless the Company earned sufficient to make its depreciation reserve?

A. Yes.

Q. If it has been set aside for that purpose isn't it to be assumed that they have received it?

A. No. It is merely a book account.

Q. And in your judgment it is immaterial what the corporation has done in respect to setting aside depreciation reserve for that purpose?

A. I have not expressed any opinion.

Q. Do you think there is a better method of arriving at the value of the power contract than taking the Company's [fol. 370] own figures? What has that to do with what remains as outstanding loss for the power plant, for which the power contract was substituted?

A. I think that the method that I have reported as the cost of the power contract is a fair method.

Q. And would you say it was fair, also, to put that into the total cost without any depreciation?

A. Yes.

Examined by The Master:

Q. Mr. Drum, I understand that the amounts you have reported here in Exhibits 1 and 2 represent the cost of reproducing the present physical property of the Duluth Street Railway Company?

A. Yes.

Q. As of December 31, 1921?

A. July 1, 1921.

Q. And the Commission's finding was based on December 31, 1921?

Mr. Mitchell: Yes. It was agreed that a certain amount had been added after July 1, but these reports are as of July 1, 1921.

The Master (continuing):

Q. The first column, the first basis, is taking the unit prices as they existed in 1915?

A. Yes.

Q. And the second column, the average prices from 1912 to 1921?

A. That is correct.

Q. And the third column the prices of June, 1921?

A. Yes.

Q. The fourth column, prices you found existing at the time of the purchase of the various units to which the different prices applied?

A. That is correct.

Q. So that the fourth column represents as to the physical property actual investment cost?

A. As near as possible.

Q. And each of the other columns represents exclusively [fol. 371] and entirely reproduction costs?

A. Yes.

Q. Now what was the course of prices from 1915 to June, 1921?

A. Well, we all know, of course, they were ascending prices.

Q. Well, it is true, is it not, that beginning with 1915 there was a sharp increase in prices,—in 1917?

A. Beginning with 1915 the prices ascended, until 1920, and I am speaking now from memory, but we found that Street Railway materials and labor lagged behind the increase in prices of all commodities, and in this way, that all commodities reach their peak in May, 1920, but the peak railway prices were lagging behind, and did not reach the peak until about September, 1920. Then prices started down and they got to about a level at the end of 1922 and then the fluctuation has been not very great since then. They followed pretty closely the United States Labor Bureau statistics index on the curve, but they lagged behind it slightly.

Q. Slightly behind the United States Bureau of Labor Statistics?

A. Yes. The prices of Street Railway material and labor today, the Index factor is slightly higher than the Index factor based on 340 commodities.

Q. Now you have taken the average price for basis number two from 1912 to 1921?

A. Yes.

Q. What per cent of the average of the prices of 1915?

Mr. Mitchell: We can take an agreed basis.

The Master: I know it is an agreed basis but I want to know what it was.

The Witness: I can figure it for you and give you the exact figures.

The Master (continuing):

[fol. 372] Q. Mr. Drum, what is the difference between going value and good will?

A. They are entirely different. Good will is a commercial term for an advantage that a manufacturing or mercantile business has by reason of its trade name and trade mark or special history, and that item is not included in the going concern value of the Street Railway Company.

Q. No such elements, going to make up good will, should be included in going value?

A. It should not.

Q. So that going value is composed of elements which entirely enter into the physical condition of the property. Now what elements that enter into the physical condition of the property have you not allowed for, in estimating the reproduction cost of this property?

A. The cost of placing the property in operation, which is the cost incurred in changing the inert physical Street Railway property into a successful going concern.

Q. You have estimated here, interest during construction, engineering, organization, taxes and legal expenses. What is there that enters into the physical condition of this property that you have not included in your estimate of cost, what possible cost could there have been, or in the possible addition to the physical property, that you have not included?

A. Well, the cost of creating the organization.

Q. Isn't there an organization and legal expense, $187,000.00?

A. That is a construction organization. That is not considered an operating expense—not considered an expense of organization at all.

Q. The amount that you have here for expenses not appearing in inventory, part of the expense of cutting off part [fol. 373] of a hill, doing certain work upon the public street, does that enter into the making of the property a going concern?

A. No. That enters into the physical property which would be susceptible of inventory had that been here at the time the work was performed. Cutting off that hill is something that is not apparent to the naked eye. Perhaps it is apparent to the naked eye that the hill *that the hill* was cut off, but what the contour of that hill was before it was cut off is not apparent.

Q. But it might be adaptable, the conformation of the street as prepared makes it adaptable for the purposes of operating the street-car, did it not?

A. It did.

Q. That was an expenditure for a definite purpose, to make the street adaptable for street-cars?

A. It was.

Q. Now, each item that has been reproduction, cost of which has been stated here, is not actual expense, or was not actual expenses at the time you made your report?

A. It was.

Q. The power house was not owned by the Company at that time, the old original power house that was used?

A. No. The original power house has disappeared.

Q. And the land was sold?

A. To my recollection the land was sold.

Q. So that no part of it appears in the inventory?

A. No.

Q. In place of that there appears a contract under which the Company has a right to purchase its power at a certain price?

A. Yes.

Q. Now the question is whether or not that contract should be included in the inventory as an item of value?

A. No value.

Q. And in arriving at that value you estimated the cost of reproducing the power house and you give that total as the value of this contract price?

A. Because the Company went at the question of a power contract in this way: they realized that they had an [fol. 374] investment in that power station; that if they made this contract they would have to sacrifice the amount of capital that was invested in the power station, and therefore this power contract would have to effect a sufficient saving to pay back to the owners of the property the difference between the scrap value and the cost new on that power station, or they would have lost that sum of money. Now in my opinion that amount is the cost of that power contract. Then I looked to see: Was the saving effected by the contract sufficient to justify the sacrifice of that amount of capital, by scrapping the old power plant? I found that in my opinion it was sufficient and that therefore the net result of the power contract would justify its cost and return of the capital to the owners of the property.

Mr. Mitchell: May I ask one question, Mr. Drum? Judge O'Brien spoke of that as your estimate of the cost to reproduce the power plant. As I understand, the figure which you have used here is the book figure as to the cost of the power plant?

A. It is.

The Master, continuing:

Q. You have not found the reproduction cost of the power plant, the original cost?

A. Yes.

Q. What is the basis you use on the power plant and reproduction cost as to physical property—what justification is there for using the investment in the case of the power contract and rejecting the investment as to the physical property?

A. Because the transaction in the power contract was made back in 1907, or at the date of the abandonment, about 1914, and that was the basis, in my opinion, upon which the Company determined to make this power contract, namely that the contract would not only return to them the [fol. 375] capital invested in the power plant, but naturally

have some additional advantage. Now, comparing that with reporting the reproduction costs, we report on four bases, one is the original cost and the other three are reproduction cost.

Q. The contract expires as of 1931?

A. Yes.

Q. What in your opinion will it be worth in 1930?

A. Very little, but in the meantime this Company is entitled, in my opinion, to be reimbursed for the capital sacrificed in securing that contract. In other words, it does not seem to me fair that the owners of this property should sacrifice $370,000 worth of property in acquiring a power contract and then give the car-riding public the benefit of the entire saving of $82,000.00 a year.

Q. Don't you think you have to take either one theory or the other, either investment or present value?

A. For the power contract?

Q. For the Company, entire.

A. Well, it is a question of law as to what should be taken in determining the fair value today.

Mr. Mitchell: We will contend that the contract, the actual value of the contract, is to be measured largely by its saving, by what it is worth to the Company. We will have the authorities to show how that sort of thing is handled. I think that this contract would be exactly the same value if it had not cost the Company a cent, but Mr. Drum's report is—all that he has said, based on cost, and that is the reason he is giving the basis for the capitalization of the earnings of the contract. It is simply a matter of computation. But our contention will be that the value of the contract, its present value as of the date of the Commission's order,—and that that is to be determined or at least is to be tested by its saving to the Company. Now it is not an unusual thing, among commissions and courts, [fol. 376] to divide that ultimate saving in some way. There is no specific basis for it, or justification for it, except that they decline to give to the utility the full value of their part of the contract. But it is not unusual to divide that fifty-fifty with the public, by which they simply arbitrarily say to the Company, You shall not have the full benefit of what you have.

The Master: Well, you will give me those percentages?

Mr. Richards: Is it your contention that part of the saving of the Company each year must be capitalized for future earnings?

Mr. Mitchell: I do not know as I understand. I am afraid you are trying to get me into a trap.

At this point a recess was taken until two o'clock p. m. of the same day, at which time the witness was recalled and was further examined.

By the Master:

Q. You say, as I remember, Mr. Drum, in speaking of depreciation, that the property would very slightly depreciate so far as service was concerned?

A. The effect on service.

Q. The effect on service?

A. Yes.

Q. Well, in determining the amount of depreciation, did you take into consideration the value of the property and appliances for rendering service?

A. No. I took into consideration the present value of the property as compared with its value now.

Q. Well, there is a school, I think, which holds that no depreciation should be allowed as long as the utility is capable of rendering service?

A. There is.

Q. You do not hold with that school?

A. I did not let that affect my determination as to de-
[fol. 377] preciation.

The Master: I did not know, from what you said, whether you took that into consideration or not.

Redirect examination.

By Mr. Mitchell:

Q. Doesn't the school that holds to the item of the investment, return on the investment, say that accrued depreciation has no place, but the courts, in so far as they have adopted the idea of reproduction, say that the question is present value and that necessarily takes into consideration the accrued depreciation?

A. I undertand so.

[fol. 378] HERBERT WARREN, recalled, testified as follows:

Examined by Mr. Carmichael:

Q. Mr. Warren, have you prepared tables showing the actual number of passengers riding for cash and the actual number of passengers purchasing tickets during the period from September 8, 1922, to and including the last day of July, 1923?

A. I have.

Q. And is such tabulation true and correct as shown by the books of your company?

A. It is.

Q. Is your tabulation that which we have marked Complainant's Exhibit 34?

A. It is.

Mr. Richards: That does not show the number of pople who bought tickets. It shows the number of tickets that were sold.

The Witness: It shows the number of tickets that were redeemed.

Mr. Mitchell: It shows the number of tickets to which coupons were attached that were sold.

The Witness: It shows the number of tickets that were collected on the car, that that number is practically the number sold, because it keeps even.

Mr. Mitchell: Then this total shows the number of tickets that were turned in as fares during that period?

The Witness: Yes, exactly. And that corresponds almost identically with the number sold over a long period.

Mr. Mitchell: The number sold is perhaps not important. It is the number that is turned in.

Mr. Carmichael: We will offer in evidence Complainant's Exhibit 34.

[fol. 379] Mr. Richards: Well, saving the other objections heretofore made, relating to a state of facts subsequent to the making of the Commission's order which is still in force as to this exhibit so far as the City is concerned. We object to it.

Mr. Carmichael, continuing:

Q. The exhibit, I think, speaks for itself. It shows generally, Mr. Warren, that there has been a trend towards a decrease in the number of revenue passengers purchasing tickets?

A. Yes, there has been a decrease.

Q. And is the number of revenue passengers purchasing tickets influenced from day to day as to various happenings in the community?

A. It appears to be and I think it is.

Q. Do you have a recent experience of that particular kind?

A. Yes.

Q. Will you please turn to your scrap book and show us what that was and when? And please explain what influence that had, in your judgment, on the ticket-paying passengers?

A. There was a newspaper article headed, "Five Car Rides for Twenty-Five Cents is Possibility. Rail Commission files application to dismiss local company's complaint." That was followed by quotations from Mr. Richards a few days later in the newspaper, in the News Tribune Mr. Richards' picture, referring to the motion to dismiss the action, under date of August 2, 1923, this year.

Mr. Carmichael: I don't believe we care to offer the paper unless Mr. Richards wishes to have it made a part of the record, but it is a column article, with the city attorney's profile. What effect did that article have Mr. Warren, on your riding passengers? Just for the Master's information state what that was.

[fol. 380] Mr. Richards: I challenge the witness' ability to state what the effect of a newspaper article is in a community.

Mr. Carman: I interpose the further objection that this testimony is so wholely conjectural as to be clearly beyond reason. It is inadmissible upon any theory or any rule of evidence existing today.

The Master: Note the objection.

The Witness: The first one was July 29 and the later one was August 2nd.

The Master: Then it has no bearing on Exhibit 34.

The Witness: It is not covered by that exhibit.

Mr. Mitchell: This we concede does represent an actual condition. Our thought is that the number of passengers who buy these coupon tickets is a measure of simply whatever confidence or thought there might be in the community that ultimately they will be redeemed. Therefore, as it seems to me, the records that Mr. Warren will use will show an actual effect, and actual result upon the number of these tickets that were used, which he attributes to Mr. Richards' article and his picture, the confidence that that inspired in the populace that they were going to get these things redeemed and get the money back. So while there is an element of fun in it it apparently is rather far removed, yet it does actually represent what we will contend is the explanation of the difference between the experience in Duluth and in Columbus.

Mr. Carman: I will repeat the objection on the ground that it is incompetent, irrelevant, immaterial, both conjectural and uncertain of no value as evidence, not within the issues raised in the pleadings, having nothing to do with [fol. 381] Exhibit 34.

The Master: The testimony will be received subject to the objection.

Mr. Carman: Note an exception.

The Witness: Immediately prior to the appearance of those items there was a tendency to decrease, week after week, in the number of those tickets used; but on the day the first article appeared, and the week following, there was an increase in the rate, of nearly 2 per cent, 1.76 per cent to be exact; there were 2,901 more tickets of that kind received during that week than the previous week.

Q. Do those figures show as to whether or not that flurry has now subsided?

A. Apparently it is receding,—not entirely subsided.

Mr. Richards: Hope is diminishing.

The Witness: The preceding week it was 22.16 per cent. This week it was 23.92.

Q. Were you present in court when the gentleman from Columbus was examined?

A. Yes.

Q. Based on your experience with the Duluth Street Railway Company what would you say as to whether, if we

had in Duluth a six-cent cash fare, five for a quarter, as to whether there would be any appreciable difference between Duluth and Columbus?

Mr. Carman: That is objected to; no foundation laid, no qualification shown, no evidence in the record that shows that this witness is competent to give any such estimate or opinion, nothing to show any comparison whatever between the Columbus Street Railway and the Duluth Street Railway. It is pure guess work and adds nothing to the [fol. 382] exhibit that has been put in, and the witness might just as well testify that he thinks the conditions would be similar to Chicago, Boston, Atlanta—as Columbus, as far as this record is concerned.

The Master: The objection is noted.

A. It was my belief that there will be 95 per cent tickets used, before we got the information from Columbus that confirmed my judgment. I believe now that fully 95 per cent will use the tickets and certainly as many as in Columbus, 92 per cent.

Mr. Carman:

Q. The complaint is verified by you and I believe that the complaint in this case is that if the Commission's fare would go into effect possibly 95 per cent of the patrons would purchase tickets and that 5 per cent would ride on cash fares?

A. That is my conclusion. I am not positive.

Q. And your judgment on that point is the same now as it was on the date you verified this compiaint?

A. Yes.

Mr. Carmichael, continuing:

Q. As the matter now stands, six-cents cash fare, or five rides for 30 cents, with this additional rebate coupon, please state why you think that a larger per cent of the people would buy tickets on the five rides for a quarter and six cents cash than on the five rides for 30 cents with the rebate coupon and 6 cents cash. Please state the reason for your conclusion on that.

A. With a ticket sold at 30 cents, giving six rides, the purchaser would save five cents for each such purchase immediately, taking it to be immediately good for car fare.

While with this coupon there is only a speculative value, it all depends on the outcome of the lawsuit, and the number of people buying them, it depends on the outcome of the [fol. 383] lawsuit, the litigation, it varies from time to time.

Q. Under the present plan in Duluth there is a present passing of the money, and parting with the money by the car rider?

A. Yes.

Q. Whether he ever received any return, is contingent on the outcome of this particular piece of litigation?

A. Yes.

Q. And as to whether the Commission's report is upheld in toto?

A. Entirely.

Q. Mr. Warren, I assume that the other side will ask you concerning your operating expenses and also expenses concerning the item of depreciation which you charged under operating expenses and have in your exhibits of past operation, and in your estimates for future operation. Will you please state about what the per cent of annual depreciation is, as carried on the books of the Company, and charged to operating account?

A. The per cent, based on the Commission's value, is 2.9, to 2.95 in the last three years.

Q. Slightly less than 3 per cent on the Commission's valuation of the property?

A. Yes.

Q. I understand the Commission, in its order, set up an allowance of 2½ per cent for annual depreciation of the property. For how many years back have you been carrying the depreciation on the books on the same method that you are carrying it now?

A. Since 1914 we have been computing depreciation by exactly the same methods and on the same basis, and have been reporting in accordance with the standard classification of accounts, to the Interstate Commerce Commission, to the Wisconsin Commission, and recently to the Minnesota Railroad and Warehouse Commission on that basis.

Q. I understand that that amounts to approximately 3 per cent on the Commission's valuation of the depreciable property?

[fol. 384] A. Somewhat less than 3 per cent.

Q. Just slightly?

A. Yes.

Q. You say that has been reported to the Interstate Commerce Commission?

A. Yes, sir.

Q. It has never been disapproved?

A. It has not.

Q. You say the present method was started on your books in 1914?

A. Yes.

Q. Was that due to having an accurate method for the purpose of following it from year to year for the determination of the corporation income tax?

A. The depreciation as computed has been allowed since there has been a corporation income tax.

Q. The Treasury Department of the United States has never disapproved of that method?

A. It has not.

Q. Your income tax, from then down to the present time, has been based on that method which you have followed?

A. Yes.

Q. Mr. Warren, is the amount of depreciation, in your opinion, which is charged by the Company in its operating accounts, any more or less than what you in your experience with this Company over 30 years have found necessary for the proper maintenance of this property?

A. I believe that it fairly represents the actual depreciation of the property from year to year.

Q. Therefore you believe it fairly represents such, as nearly as you have been able to arrive at it?

A. Yes, I think it does.

Q. And you think that any other figures would be liable to be more inaccurate than this is accurate?

A. I do.

Q. And if any change in the method was adopted it would be necessary to run back to 1914, under the Federal Income Tax Return, and make some adjustment with the United States Government?

[fol. 385] Mr. Carmichael: Well, that is a legal conclusion and I will withdraw the question, but we all know that to be the fact. You may inquire.

Examined by the Master:

Q. Was that depreciation report of the gross amount each year since 1914?

A. It has been reported in three separate items, two each of the Commissions referred to, the Interstate Commerce Commission, the Railroad Commission of Wisconsin, and for the past two years to the Minnesota Commission.

Q. Have you got the total amount?

A. I had it on a memorandum,—about a year,—is that what you want.

Q. I suppose it varies from year to year according to the amount of profit?

A. It varies somewhat.

Q. I just wanted the total since 1914.

A. I would have to compute that.

Q. What is the total for 1914?

A. 1914, $86,964.24; 1915, $83,028.51; 1916, $91,670.33; 1917, $98,869.19; 1918, $110,732.93; 1919, $116,912.43; 1920, $121,387.17; 1921, $134,303.81; 1922, $135,742.59.

Mr. Carmichael: The same method as you have been following for 1914, up to and including 1922, has been followed by you in making your estimate for the remainder of the year 1923 and for the year of 1924, on exhibits that have been introduced in evidence?

The Witness: Yes.

Q. Now some of those sum do not stand in toto on the books, do they, but charges have been made out of that for renewals such as properly may be taken out of that in [fol. 386] accordance with the classification of the accounts of the Interstate Commerce Commission?

A. They do not. I have no account here that shows the total.

Q. But I say charges have been made against that for the renewals as occasion required?

A. Oh yes, yes.

Mr. Carmichael: You may inquire.

Cross-examination.

By Mr. Carman:

Q. And it is a fact, that in December, 1921, the date as of which the valuation was fixed by the Commission, the balance in your depreciation reserve amounted to about $970,000.00?

A. I do not recall the amount now.

Q. Well, isn't that approximately right?

A. That sounds somewhere near the amount.

Q. And 20 per cent on the Commission's valuation of the property?

A. Well, that is a matter of computation, of course.

Q. The amount is correctly stated in your complaint in this action, the amount of the balance in your depreciation reserve, is it not?

A. Well, I presume so. I do not know what amount is stated. I have the amount here, if you would state it again.

Q. Yes. Will you state the amount?

A. $972,806.38.

Q. That is the amount stated in the complaint. Now, this balance of depreciation reserve had been increased up to the figures you have stated between 1917 and 1921, over a balance of 1917, of $537,139.11, hadn't it?

A. It had been increased over that amount since the end of 1917.

Q. Going back now to your testimony when you were on the stand previously, and taking up the cross-examination commencing with Plaintiff's Exhibit 4, and referring to an item listed on page 1 of Exhibit 4 and described as "Ease-
[fol. 387] ment in 7th Avenue West from Superior Street to midway between 8th and 9th Streets, being the right of way of the 7th Avenue West Incline Railway." There is set up a value of $46,835.00. I will ask you to state whether or not you know what the actual cost of that item was, to the Duluth Street Railway Company?

Mr. Carmichael: Objected to as immaterial.

The Master: The objection will be noted, and exception.

A. I do not know for the moment.

Q. Do you know approximately what the cost was?

A. I would not want to testify even approximately until——

Q. You do know that the actual cost was very much less than $46,835.00, don't you, Mr. Warren?

A. No. I could not say it was very much less than that. I do not know just what it was.

Q. You have described this land over which this easement exists as a street which had been laid out, but which, on account of the contour of the land, in your judgment could not be opened and used for a street, have you not?

A. Yes.

Q. And which land is equally worthless for any other commercial purpose, is it not?

A. Yes, I should say it was.

Q. Isn't it a fact that that land along that location described, where this easement now is, is worth less today on the market than it was twenty years ago?

A. I don't know as to that.

Q. Is not the whole locality where this easement is located one which has never shown any progressive development or increase in land values since at least the year 1893?

A. I have no knowledge of the relative values now and in 1893.

Q. Taking your patronage, has your patronage increased over that Incline Railway, which uses this easement in the last ten years?

A. I believe it has, I would say that it had.

[fol. 388] Q. And can you give us any idea how much approximately?

A. Why, it would be my guess that it was 50 per cent more today than it was ten years ago.

Q. Fifty per cent increase in patronage?

A. Yes, on that Incline Railway, I mean.

Q. That incline goes up to the top of the hill and opens up a settled section back of it, does it not, on the top of the hill?

A. Yes.

Q. And the place where this easement is located is in the main not settled, is it—too rough to build on, isn't it?

A. It is all well settled between Superior Street and Fourth Street.

Q. The low part of it?
A. Yes.
Q. And the steep part of it is still unsettled, isn't it?
A. Not very thickly settled.

The Master: What is the distinction between that and the right to travel over the other streets, to lay tracks on the other streets?

Mr. Carmichael: Well, it is an additional service, it is a structure, not on grade.

Examined by Mr. Carman:

Q. Mr. Warren, how much damages did the Street Railway Company pay to the abutting owners of this easement?
A. I don't know, I have not that in mind.
Q. Would you get the information? Won't it show from your books?
A. I have a recollection that we at one time attempted to ascertain what it did cost, but whether we were able to find from the records, or not, I don't know.
Q. How old is it? How long have they had it?
A. It was in operation when I came to Duluth in 1893. I think it was built in 1891.

[fol. 389] Mr. Carmichael: As far as you know, it was acquired before you came here in 1893?
The Witness: Yes.

Mr. Carman, continuing:

Q. And in your opinion the books of the company will not show what damages were paid to the abutting owners for acquiring that easement?
A. I don't believe they do show it.

Mr. Michell: The statement was made up by Mr. Gifford and he located in various ways $31,754.22 that had been paid. Some of that appeared through court records and some through deed records and various ways. I do not know as we have ever been able to check it up.
The Witness: The statement is the one I referred to as an attempt to get at the cost.
Mr. Carman: It comes down to this, if it is non-obtainable, the amount paid for this easement—$13,754.22.

Mr. Mitchell: That is what Mr. Gifford got from our books. We have no evidence of any more. We can trace that much and we have not been able to find any more.

The Witness: I would say the minimum cost would be that much, and I don't know how much more. I recall that statement.

Mr. Mitchell: And do you know whether this Board of Realtors had this information?

The Witness: Yes, it did have that information.

Mr. Mitchell: Gotten up for their use?

The Witness: It was.

Mr. Carman, continuing:

Q. Returning to the matter of land used jointly by the Duluth division and the Superior division of the company for office building. I will ask you to state whether or not [fol. 390] the land so used consists of lots 422 and—422 to 432, being in block 47 of Duluth Proper, Second Division?

A. No, I would not say that those lots were so used; not all of them, anyway.

Q. That is the description, all of block 47—I am asking whether or not these eleven lots which were included from 422 to 432 was the property used jointly by the two divisions?

A. 422 to 432 in block 47, do you mean?

Q. Yes.

A. I have no means of knowing which those particular lots are. The fact is that that entire block is covered by the carhouse and the car storage yard, the general utility buildings on one lot, and general office buildings, which is on one lot, and the part of the car-house building occupied as general repair shops.

Q. General shops are used by both divisions?

A. Why, the part of that building—that building is largely car-house, and it is used to store only the cars used by the Duluth division.

Q. No use there by Superior?

A. None whatever.

Q. Nor anything except this——

A. No; there is a part of that which we use for general shops, and in those general shops Superior cars are carried as well as Duluth cars.

Q. In your own apportionment you have apportioned this building on your own books 75 per cent to the use of Duluth and 25 per cent by Superior?

A. I think it was, yes, I think that is in the report of buildings.

Q. Turning now to Exhibit 5——

Mr. Carmichael: May I ask now a question on Exhibit 4: Mr. Warren, Mr. Carman asked you about 7th Avenue West, if it could not be opened up for street purposes, and I think [fol. 391] you answered Yes and then that called up this question, if 7th Avenue West was not equally worthless for any other purpose. Now is it not a fact that Superior and 4th Street, on each side of your Incline, the houses are built up fairly close to it?

A. Yes, yes.

Q. Isn't the land on 7th Avenue West equally available for residents who have bought on each side of it?

A. Yes, that is it. I did not understand the question; I answered that it was equally worthless for commercial purposes.

Mr. Carman, continuing:

Q. Well, this is built up down on the lower part nearest to Superior Street and not built up over toward the hill?

A. Not as thickly, no.

Q. Coming now to Exhibit 5 introduced in connection with your testimony when you were on the stand before and purporting to be a statement showing the operating income with straight six-cents fare and the return allowed by the Commission from August 1, 1922, to July 31, 1923, with July estimated, I ask you to state whether or not the operating income as set up in this table has ever been adjusted for operating expenses claimed by the company—by the Commission?

A. I do not understand, you say "adjusted."——

Q. You set up a claim with figures here, claiming that the operating income is as set forth in those figures?

A. Yes.

Q. And you arrive at that conclusion, do you not, by deducting your operating expenses from your gross revenue?

A. Yes.

Q. Now those operating expenses deducted from that gross revenue, have not been passed upon by the Railroad Commission?

A. They have been reported to the Rail Commission.

Q. They have been reported but you do not know whether they would be allowed or adjusted or not?

[fol. 392] A. I don't know that the Commission has taken any official action in passing upon them.

Q. It is a fact that if adjustments of those operating expenses made by the Commission for the entire period should amount to more than $30,027.08, that this table would show no deficiency at all on the adjustments made by the Commission?

Mr. Mitchell: That is objected to as incompetent, irrelevant and immaterial.

The Master: Note the objection.

A. Why, it is true if the operating expenses there shown were decreased by $30,000 there would be no deficiency shown.

Q. This Exhibit 5 in which is set up this statement of operating income and compared with the return allowed by the Commission, shows an operating income based, for instance, upon an operating expense which includes about 3 per cent set aside for depreciation, does it not, approximately 3 per cent as stated in your testimony today?

A. That is correct.

Q. And if it made a true and proper comparison with the rates allowed by the Commission, following it all the way through that would have been 2½ per cent?

A. Yes.

Mr. Mitchell: Just a minute. There is no order of the Commission that——

Mr. Carman: We have heard that about nine times.

Mr. Mitchell: But the witness did not hear it.

The Witness: I would like my answer to be understood that if 2½ per cent were used instead of 3 per cent it would make the difference which you state.

Q. Mr. Warren, referring to Exhibit 7, being a statement prepared to show the operating income at a straight six-cent fare and the return allowed by the Commission. I [fol. 393] will ask you to state whether or not the column

of figures headed "Operating Income at Straight Six Cent Fare" was arrived at in the same method as the Exhibit 5?

A. They were arrived at by the same method, the figures are identical down to the red figure.

Q. And they reflect the operating income as claimed by the company after making the deductions which the company claims should be allowed, rather than the operating income which might result from making deductions from the gross expenses which the Commission might allow?

A. They are arrived at in every way the same as the previous exhibit.

Q. The difference between Exhibit 7 and Exhibit 5 in other respects relates to the item of $153,435.38, added as net additions to the property between December 31, 1921, and January 1, 1923, and also estimated net additions of $105,302.00 added for the whole year of 1923, or for the rest of the year 1923 beginning July 1, 1923?

A. That is the only difference.

Q. Now the net additions to the property. This figure of $153,435.38 is what the company claims should be added to the valuation fixed by the Commission as of December 31, 1921?

Mr. Carmichael: Mr. Carman, that is shown on Exhibit 23 and that figure has been agreed to between the City's engineers and the Company's engineers.

Mr. Carman: Well, I want to get this question in, anyway.

Q. Showing down to January 1, 1923?

A. Yes, beginning with July, 1922, and for all the period shown prior to January.

Mr. Carmichael: I am not so sure you mean that, we claim a little more but we claim that as the net property additions during that particular year.

[fol. 394] The Witness: That is correct.

Q. Now this item of 105,302, which is added here in Exhibit 7, is what the Company claims should be added for capital expenditures clear down to January 1, 1924?

A. It is what the Company claims should be added for capital expenditures estimated beginning with July, 1923.

Q. And ending with?

A. June, 1924.

Q. Ending June, 1924?

A. Yes.

Q. So that in this compilation Exhibit 7, which purports to show a deficit claimed by the Company of $42,302.63 in operating income, you have included all capital expenditures to a full year in advance of July 31, 1923?

A. No, no. The capital expenditures account to be added as of July 10 of the year——

Q. Well, the capital expenditures which you expect to put in up to July 1, 1924 are $105,302, are they not?

A. Yes.

Q. And the $105,302 is figured into this compilation in order to get a deficiency of $42,263.65 on July 31, 1923, is it not?

A. Yes, only in the month of July it begins with the last month shown in that statement and after only that month.

Q. In other words, the value, the base value upon which you have figured this deficiency of $42,302.63 is the full value of the property on July 1, 1924, is it not?

A. It is the Commission's value of the property with that addition added in the month of July only, and it was not changed until June for the next year according to the method used here.

Mr. Mitchell: Mr. Warren, I have not got that clear yet. As I understand you, the $105,302 is the expenditures part of which are actual and part of which are estimated, covering the entire period of 1923?

[fol. 295] The Witness: Yes, exactly.

Mr. Mitchell: And you have followed the plan of capitalizing the entire expenditure for half of the period?

The Witness: Exactly.

Mr. Mitchell: So that you have treated that $105,302.00 as part of your capital for the month of July only?

The Witness: Yes.

Mr. Carman, continuing:

Q. Taking now Exhibit 9, which is a set-up showing the operating income of the plaintiff during the year 1921, on a five-cent fare then in effect, this shows an operating income of $185,860.30, does it not?

A. Yes.

Q. For that year on a five-cent fare?

A. Yes.

Q. And that was when you were operating under the old arrangement with the City of Duluth?

A. That was in the year 1921.

Q. That is not under the Brooks-Coleman Act?

A. It was all prior to any increase in the fare.

Mr. Mitchell: You were operating under the Brooks-Coleman Law after the 29th of April, 1921?

Mr. Carmichael: And had no increase in fare.

Q. But there was no increase in fare in that year?

A. That is correct.

Q. Now in arriving at this operating income figure you deducted, among other things, from your gross income of that year, the Jager defalcation, did you not, amounting to about $7,600.00, you included in your operating expenses $7,600 to cover the Jager defalcation?

A. There was some part of that expense in connection with the matter in the 1921 expenses.

Q. What was the Jager defalcation, for the record?

A. It was a case in which a man named Jager stole some [fol. 396] securities that belonged to the Company, which were deposited in Minneapolis. He was apprehended later and the securities were returned, and there was a certain expense in conection with his apprehension.

Q. And this amount was the expense in connection with his apprehension covering the securities that were lost?

A. Yes.

Q. Do you consider that a normal item of operating expense?

A. I would not say it was normal, in that it would be one that would be expected to occur every year, but it was what we might call occasional expense.

The Master: How much was that?

Q. I asked you if it was $7,600.90?

A. I could not state as to that. I do not know just what it was.

Mr. Carmichael: $4,800 of that was on a forged check, was it not, by this man Jager?

The Witness: Yes, it was.

Mr. Carman, continuing:

Q. Is the amount correctly stated, $7,600.00?

A. I could not tell you now. I could ascertain but I could not tell you now.

Q. In arriving at that operating income you also used your approximately 3 per cent depreciation that year, the same as the other year?

A. Yes.

Q. And you also paid that year, as a part of the operating expense, the salary to Mr. Ames amounting to $3,600, did you not?

A. There was such an item included at one time in the operating expense, but it was afterwards eliminated at the time of the hearing before the Commission.

Q. And it was conceded at the hearing before the Commission that that item should not be included in operating expense?

[fol. 397] Mr. Carmichael: There was no dispute about it. It was merely stated that it would not be included, and it is not included in the years—it is not included in Exhibit 9 and the years thereafter.

Q. Defendant's Exhibit 9 also includes the consideration of non-operating income, does it not?

A. Yes, it does.

Q. Now so far as this Exhibit 9 tends to show what might be expected in future years, you must take into account reductions in wages and operating expenses during the future years?

A. Why, yes, it is true, if there are deductions.

Q. There was decrease, for instance, in labor costs for the year 1922, from the year 1921, was there not?

A. I may have to refer to the memorandum before I can answer; that there was a decrease in the wages of certain employees at the beginning of that year. There was some decrease in the average per cent.

Q. What was such decrease in per cent, can you tell us?

A. What per cent of decrease?

Q. Yes.

A. I can get it.

Q. Can you give us the specific amount in dollars of the decrease of wages used as a part of the operating expenses in the year 1922 over the year 1921?

A. It was 5.8 cents per hour.

Q. And that amounted to about $59,000.00?

A. I could not say as to that.

Mr. Richards: Isn't that the figure you gave in your former testimony before the Commission, that it amounted to $59,000.00 plus?

The Witness: I have a recollection of some such figure, but I am not clear enough on it to state whether or not that was it.

[fol. 398] Q. There was also a reduction in material costs in 1922 over 1921, was there not, that is in maintenance material?

A. I could not now be sure whether there was or not or to what extent there was such reduction.

Q. In your Exhibit 9, in arriving at the net operating income, you also set aside all taxes including the Federal Income Tax for that year, don't you?

A. Yes.

Q. Going now to Exhibit 10. State whether or not, in arriving at the conclusions stated in this exhibit for the year 1922 you were still allowing as of your operating expenses some of the Jager defalcation. My recollection is that there was some part of that carried into 1922.

Q. You were amortizing it over a period?

A. Yes, and it was completely charged out in 1922, as I recollect.

Q. Your deductions for depreciation reserve and payment of taxes in 1922 were the same as you have testified with reference to 1921?

A. Made exactly in the same way, on the same basis.

Q. Mr. Warren, can you tell us how much was paid for maintenance and how much for operation in the year 1921?

A. I can give you that from computations, what was paid for maintenance in 1921, in two amounts, and I can give you the total amount of operation.

Q. Give us, then, the two amounts for maintenance first?

A. The amount for maintenance, Ways and Structure, was $36,784.86. The amount for maintenance of equip-

ment was $96,834.95. And the total railway operating expense was $1,116,215.56.

Mr. Carmichael: Mr. Warren, please check those figures against your exhibit and see if they are totaling the same.

A. The only one we would show on the exhibit would be [fol. 399] the total of $1,116,215.56.

Mr. Carmichael: Do your figures check?

The Witness: The total is the same, but the figures that I gave as maintenance show the total under the head of Structures and Equipment as the proportion of these items. I understood that was what was desired.

Mr. Carman, continuing:

Q. Can you give us the amount set aside for depreciation for the year 1921?

A. $134,303.81.

Q. Now the difference between those three lesser figures you have stated and the larger figure of $1,100,000 and some odd would be the operating expense of the company for 1921?

A. Other than maintenance. The figures I gave you were not the total according to classifications charged under Way and Structures, nor the total which is charged to Equipment, but only a part of those, and the remainder would be operation.

Mr. Carmichael: So that the difference between the sum of Way and Structures and Equipment, and adding to that depreciation,—taking that away from the million dollars, will leave you the cost of operation?

The Witness: It will leave the remainder of way and structure expense, equipment expense, power, transportation, traffic, general miscellaneous.

Mr. Carmichael: Which would be operating expense?

The Witness: All operating expenses, yes.

Mr. Carmichael: As being separated from maintenance expense?

The Witness: Yes.

The Master: In the second division of Exhibit 10 I find, Way and Structures total for 1921, $153,565.65?

[fol. 400] A. That is correct.

Q. In answer to Mr. Carmichael's question you said, amount charged to Maintenance, Way and Structures, 1921, $36,784.86?

A. The one includes everything already in the classification, and goes under Way and Structure. It includes removing snow and ice in the winter and other items in the maintenance.

Q. I do not know yet, I do not understand where the difference is, why the difference in these two figures is part charged to operating expense. There was $153,560.65, according to Exhibit 10, charged for maintenance of way and structure?

A. It is under subdivision of Way and Structure.

Q. There is a difference in way and structure and maintenance of way?

A. I understood the inquiry to be directed at what we call structure maintenance irrespective of such items as removing snow and ice, or cleaning and sanding. That might not have been what was desired but that is what I intended to give.

Q. What is your distinction between the two aside from the character of the work done?

Mr. Gifford: Maintenance is more nearly in line with depreciation, while operating expense is continual expense which has no reference to depreciation.

The Master: Then on the books of the Company there is a distinction made between such matters as cleaning snow and ice, oiling switches and cleaning switches?

A. Yes, there is.

The Master: Straightening the track or removing snow and ice from the track?

The Witness: That would probably be classed as maintenance. The value that you speak of would probably be [fol. 401] classed as maintenance. But there are 28 separate subdivisions, in the account under Way and Structure.

The Master: The amount charged for maintenance was, as you have given to Mr. Carman, $76,784.86?

The Witness: Yes.

Q. While the amount of actual expenditure in keeping the tracks clear and the structure in operating condition was $153,560.65?

A. That is correct.

Mr. Mitchell: Under the general head of Way and Structures, there are 28 different items and one of these items is the $36,000 and the same is 28——

The Witness: That is not quite right. 36,000 is the sum of a number of them.

The Master: One group of these 28 amounted to 36,000.

Mr. Carman: Can you give us the same data for the year 1922?

The Witness: Yes. In 1922 the maintenance portion of the way and structure subdivision of accounts was $32,556.80, and the corresponding portion of the equipment charges, $84,317.93. The total of each of those items shown on the exhibit——

Q. And depreciation for that year?

A. Depreciation, $135,742.59. The total railway operating expense, $1,057,330.74.

Mr. Carmichael: There is a little depreciation in power that is not included in Way and Structures or Equipment.

The Witness: That is true.

Mr. Carmichael: That might be misleading, the figures might not check without that statement.

Mr. Carman: Will you give us the figures of depreciation [fol. 402] on power in those years?

The Witness: I haven't it separately. The amount I gave for depreciation is total depreciation including power.

Mr. Carman: Well, that is all right. Taking up Exhibit 11, in making up this exhibit you have also used the Company's figures for depreciation set aside, of approximately 3 per cent?

The Witness: Yes.

Mr. Carman: And your method generally of arriving at the results here has been the same as in the preceding exhibits about which you have testified?

The Witness: It has.

Mr. Richards: May I ask a question in regard to 1921 and 1922, Exhibit 10 and 11, neither one of these statements account for non-operating income?

The Witness: They do not.

Mr. Richards: And can you state what your non-operating income for 1921 was?

The Witness: I cannot tell you.

Mr. Carmichael: The item composing the non-operating income has nothing to do with the operation of the company and has no proper basis in this case for any consideration whatever. It was not considered by the Commission, and nothing said about it in its order.

Mr. Richards: I would like to have the facts, anyway.

The Witness: I haven't the amount at hand.

Mr. Richards: For either year?

The Witness: No.

Mr. Carman, continuing:

Q. Mr. Warren, in the 1921 account and in the 1922 account [fol. 403] as shown by Exhibits 10 and 11 you included in your computations of the operating expenses all taxes that were paid on the property of the Company situated in Duluth, including the property used as the office building and repair shops for both Duluth and Superior, did you not?

A. Yes. It might be that that would be a very small item in proportion.

Q. It would be as large as two thousand dollars, wouldn't it?

A. No, no; I think not, maybe half of that.

Q. Exhibit 12, being an estimate of operating income from July 1 to December 31, 1923, and on the basis of a straight six-cent cash fare—this Exhibit 12 is based upon the preceding exhibits, is it not?

A. Well, very largely. The estimate was made by taking into consideration the figures as shown by the preceding exhibits.

Q. And the estimate of operating income was arrived at by making some kind of deductions from gross revenue, and on the same price as in the preceding exhibits about which you have just testified?

A. Yes.

Mr. Carmichael: That does not include the Jager defalcation and no salary to Mr. Ames after January 1, 1922?

Mr. Carman: I assume that that is answered already, that that salary stopped at a certain time and that the defalcation was wiped out.

Mr. Carman, continuing:

Q. Exhibit 13, the estimate of the operating income for the year 1924 on the basis of a straight six cent cash fare, your computations in this exhibit were made in the same way and upon the same price and under the same rules as your computations in the preceding exhibits about which you have testified?

A. Yes, that is true.

[fol. 404] The Master: May I ask what "Revenue from other railway operations" means?

The Witness: It includes receipts from car advertising, among other things, revenue from chartered cars or from the Government for carrying United States mail. I don't believe I gave you the answer accurately in the classification. The items I gave are revenue from transportation, revenues from other railway operations includes rental from station and car privileges, rent of equipment, rented buildings, and other property, power, and miscellaneous.

The Master: This suggestion with reference to non-operating revenue. What would that include?

The Witness: That would refer to revenue from property that was not a part of the railway property and had no connection with railway operations.

Mr. Mitchell: What is that property?

The Witness: Well, there might be some securities.

The Master: Interest on securities?

The Witness: Yes.

The Master: Do you include everything like park privileges, pavilions?

The Witness: Well, we don't happen to have any, or have not had for a good many years anything of that kind. I don't know, that might be non-operating revenue but we don't happen to have anything of that kind so it does not enter into it. It depends on how closely the parks are connected with the railway operation.

The Master: I was wondering what revenues were excluded.

Mr. Mitchell: That was fully gone into before. I think [fol. 405] there is no reason why Mr. Warren should not very briefly state that.

A. I can give you that from the classification.

Mr. Mitchell: Well, as to this particular case, what is the property from which non-operating income is derived?

The Master: It has not been gone into in this hearing.

Mr. Mitchell: No, before the Commission.

The Witness: In our case the only thing is interest from securities.

Mr. Mitchell: Well, you have a provision, haven't you, in one of your trust deeds, which requires the proceeds of certain securities to be held for emergency use?

The Witness: Yes.

Q. And that the proceeds of those bonds which have been invested in securities, are held and owned by the Company?

A. Yes.

Mr. Mitchell: Now those are stocks and bonds.

A. Bonds, I think there are no stocks.

Mr. Mitchell: And those were the securities that were embezzled by this man Jager?

The Witness: A part of those—no; no; they were not; no, they were not those securities, they were not touched.

Q. But those bonds or those securities from which the Company receives some income, were as I understand not included in any way in the inventory or in the exhibits that have been introduced in evidence?

A. They were not. That is, it is the income from those securities that constitutes our non-operating revenue.

Mr. Carman, continuing:

Q. One question I omitted on Exhibit 11 concerning operating expenses for 1922. Is it not a fact that in that [fol. 406] year the expense for removal of snow and ice was abnormally high?

A. It was.

Q. About $10,000.00 above the average?

A. Yes, I would say it was that, perhaps more than that.

Q. Exhibit 14 is the exhibit that you have withdrawn, I believe.

Mr. Carmichael: And 14-A also is withdrawn.

Mr. Carman: Fourteen and 14-A have been withdrawn. I want that to appear in the record at this time, showing the reason why we do not cross-examine on that.

Mr. Carmichael: We decided that those are only computations and that no benefit can be gained from those. We can put in our briefs. They are only applications of three cases and they are really not quite proper evidence.

Mr. Carman: Well, in connection with that statement it must not be understood that the defendants consent that those exhibits may be withdrawn, and held to be used in argument only in the briefs. We do not want to be understood as consenting, from the statement made by counsel, that the exhibits they have withdrawn are to be used in arguing on a brief instead of being put in evidence.

Mr. Mitchell: I warn you now that we do expect to use from those compilations or others that we think are better in the briefs. So do not be misled about it, but I have not at any time thought that that was the proper thing to take the time of the Court in attempting to establish by evidence, any more than we would offer those cases in evidence.

Mr. Carman: Our only point is that we want it understood that they are argument and not evidence.

Mr. Mitchell: We agree to that that they are argument [fol. 407] and not evidence. We won't claim that they are effective evidence but we do intend to use those three cases trying to explain to the Master what the application of them would mean in this hearing.

Mr. Carman, continuing:

Q. Coming to Exhibit 15, statement of revenue passengers carried by months during the year 1921 and showing a total of 27,246,916 revenue passengers carried during that year, I ask you to state whether or not in your testimony before the Commission on January 10, 1922, you estimated for the Commission that the number of passengers being carried for the year 1922 would be 27,200,000?

Mr. Carmichael: What page are you referring to in the testimony, Mr. Carman?

Mr. Carman: I have not got the page here—Exhibit 22.

Mr. Carmichael: Based on what rate of fare, Mr. Carman?

Mr. Carman: Five cents, I believe it was.

The Witness: I made such an estimate of passengers based on a five-cent fare and a very considerably lower number at a six-cent fare.

Q. You say you made an estimate lower on a six-cent fare, then?

A. Yes.

Q. What was your estimate on the six-cent fare?

A. 26,112,000.

Mr. Mitchell: And the number actually carried was considerably less than that.

Mr. Carman: What was the number actually carried?

Mr. Mitchell: 25,572,187 is what I have here.

The Witness: That is correct.

Mr. Carman: That is for the year 1922.

A. Actually carried in 1922, 25,572,187.

[fol. 408] Mr. Carmichael: Didn't the Commission have the actual amount carried in 1922 down to within the first five months of the year at the time the order was made?

Mr. Carman: It was the first three months.

Mr. Bowen: The Commission estimated 27,030,000, coming down to Exhibit 16. By comparison of revenue passengers carried from January 1 to July 31, 1921, and in 1922, both at five-cents fare, you arrive at a conclusion that there was a decrease in passenger traffic of 6.843 per cent?

The Witness: Yes.

Mr. Carman, continuing:

Q. Now the decrease was largely attributable to abnormal weather conditions in February, was it not, in 1922?

A. It was. Well, I don't know as I would say largely. It was materially affected by that. There was a constant decrease through all of the seven months.

Q. And that also covered a period in which Superior Street or a part of it was out of use on account of the tracks being torn up for repair operations, did it not?

A. Yes, it did, in 1922.

Q. Was there any jitney competition in the early part of 1922?

A. There was some, if I am not mistaken. Yes, there was some, I know.

Q. But not very much?

A. There was less during the time, the traffic being torn up on Superior Street, the jitneys did not come down on Superior Street as they did after that.

Q. And there was considerably less during the first half of 1922 than the last half?

A. Yes.

Q. In your judgment will these figures of 6.842 per cent, the number of revenue passengers, continue indefinitely?

A. I would hate to think it would continue indefinitely.

[fol. 409] Q. Well, how long, in your judgment, will it continue?

A. Before answering that I would like to refer, if I may, to my data. I haven't that right here. I know of no reason to expect any change in that in the next half year anyway, possibly the next year.

The Master: Change in what?

The Witness: Change in the rate of decrease.

Q. You think that it would continue from a half year to a year, then?

A. Yes, I am afraid it will.

Q. Do you know what is causing this decrease?

A. I don't know that I know. I have some idea.

Q. Is it largely due to jitney competition that has sprung up since the six-cent rate of fare went into effect?

A. Not so much as to the increasing use of private automobiles. But it has to some extent been due to jitney competition and there was jitney competition before the rate of fare was changed, to some extent. There has been some now and has been some all summer.

Mr. Carmichael: Your heaviest jitney competition was about six years ago, wasn't it?

The Witness: It was at its height six years ago, or in 1915, and more.

Q. How many passengers, in your judgment, have the jitneys handled since the six-cent fare went into effect?

A. I would want to have a little time to make some computations before attempting to answer that.

Q. In your affidavit in this court in support of the preliminary injunction against the Commission did you not estimate that the revenue passengers would show in 1922 [fol. 410] an average decrease as compared with 1921 of 7.2 per cent during half of the year, as compared with the first half, with a five-cent fare?

Mr. Carmichael: Mr. Carman, may I hand Mr. Warren copies of his affidavit so he can state whether or not that is a fact?

Mr. Carman: Yes. Page 57 of printed record, near the top.

The Witness: I did state that I believed there would be, during the last six months of 1922, 7.2 per cent less revenue passengers carried than in the last six months of 1921. I don't recall making any condition as to the rate of fare and I do not see that that is referred to in the affidavit here.

Q. Now isn't it a fact that it worked out actually to be a decrease of 5.097 per cent as shown in your Exhibit 17?

A. 5.097 is the rate of decrease for the last five months of 1922 as compared with the last five months of 1921 as shown by that exhibit.

Q. And that was the rate of decrease under a six-cent fare, was it not?

A. Yes.

Q. Now did you not also estimate that the putting in of a six-cent fare would make still further reduction of 4 per cent, independent of this 7.2 per cent decrease that would follow that normally, with a five-cent fare?

A. I believe I did.

Q. Coming now to Exhibit 18, this exhibit shows an average decrease in revenue passengers for the six—first six months of 1923 as compared with the first six months [fol. 411] of 1922, amounting to .391 per cent or a little more than one-third of one per cent.

A. Yes. That is the average net decrease, taking into consideration the increases in the early part of the year due to a difference in weather conditions in the two years.

Q. Increases due to difference in weather conditions?

A. Yes.

Q. And do you think that that difference in weather conditions explains and reconciles this .391 per cent decrease actually with your estimate just made in connection with Exhibit 16, with the decrease of 6.843 per cent that might be expected to continue for the next year?

A. Well, I only know that in this exhibit it is shown that there was a decrease of 2 per cent in April, 3.149 in May, 2.603 in June, and I think that if we *have* had July figures

we would have a further decrease of 3 or 4 per cent. It is increasing rather than diminishing, if I am not mistaken.

Q. But none of these months shown in Exhibit 18 show even by months a decrease of much more than half the average decrease shown on Exhibit 16; isn't that a fact?

A. Yes, that is true.

Q. And yet this decrease in the year 1923 occurred while a six-cent fare, with the sale of tickets five for thirty cents and an additional redeemable coupon, was established, did it not?

A. Yes.

Q. As compared with a straight five cents during the period of decrease in revenue passengers shown in Exhibit 16?

A. Yes.

Q. Coming now to Exhibit 19——

The Master: Before you finish 18 of the figures for the months are January to June in 1923. The average decrease of .391 is in addition to the decrease of 6.843 shown on Exhibit 16, is it not?

[fol. 412] The Witness: Yes, except the periods are not the same, one includes July. Sixteen includes July, but it is true that it is a decrease on a decrease.

The Master: Did you understand that, Mr. Carman?

Mr. Carman: Yes. I understood the witness, however, to testify that this ratio of decrease might be expected to continue for the next year, the ratio of decrease in Exhibit 16.

The Master: Very well.

Mr. Carman: And that was the purpose of my question about 18. In making your estimate shown on Exhibit 19 by months of the number of revenue passengers which you expect to carry from July 1 to December 31, 1923, did you use the percentage of decrease set up in Exhibit 16 as the basis for this computation?

The Witness: No, not entirely. In making that estimate I presumed a continuation of the same rate of decrease over an average for the past three years.

Q. Well, your judgment in making this compliation was not that the decrease would be any less than shown on Exhibit 16?

A. I do not know how to refer to it as compared with the decrease shown on Exhibit 16.

Q. What percentage of decrease have you applied to this six-months' estimate in Exhibit 19 as compared with the actual known facts for the first half of the year of the number of passengers carried, and for the actual known facts as to the preceding year, as covered by your estimates here from Exhibit 16 on?

A. In making that estimate for the remainder of 1923, I considered the number of passengers that had been carried so far in 1923 as compared with the average number carried [fol. 413] in the three preceding years, and took an average of three years in those months and found that the decrease in May, 1923, was 13.12 per cent under the average made. In June it was 14.93 per cent under the average of the three preceding years. In July it was 15.44, constantly increasing. I estimated for the last five months of 1923, exclusive of some additional passengers, we expected to be carried by reason of the Ninth Street line, there would be a decrease as compared with the average of three preceding years, to 13.66 per cent.

Q. You used in the three preceding years the passengers carried in 1920 as one of the bases of comparison, did you, 1920, 1921, 1922, the three years that I spoke of?

A. 1919, 1920, 1921 were the three years used.

Q. Now the year 1920 you carried an abnormally high number of passengers, did you not, 29,000,000?

A. Yes; in the year 1920 it was high.

Q. A little more than 29,500,000?

A. Yes.

Q. Coming to Exhibit 20, will you tell us how you arrive at your figures on Exhibit 20, this is an estimate, by months, of the number of revenue passengers which you expect to carry in 1924, with the six-cent cash fare in effect?

A. For the year 1924 I assumed a decrease of 12.5 per cent under the average for the three years, that decrease now being, or being most recently, 15.44 per cent.

Mr. Mitchell: You say "most recently."

The Witness: In July. The number carried in July showed a decrease of 15.44 per cent under the three years, the average of three years, 1919, 1920, 1921, I assumed there

was some relative importance and that there would be a decrease of 12½ per cent as compared with 15.44 per cent [fol. 414] in 1924, and then I made some allowance expected to be added by reason of the operation of the two extensions, one which will be put in operation August 1, 1924; the other one will be put in operation first of September next.

The Master: The average for the same three years, 1919 to 1920 and 1921?

The Witness: 1919, 1920, and 1921.

Q. Your total estimate for the year of 1924, as shown by Exhibit 20, is 25,220,000 revenue passengers, while under your previous testimony, relating to the difference between the number of passengers that would be carried under the five-cent fare and the six-cent fare, this figure 25,220,000 would be 96 per cent of the amount which you would estimate would be carried under a five-cent fare, wouldn't it?

A. Yes I think it would. I would assume that it was 4 per cent difference.

At this point an adjournment was taken until the following morning, Wednesday, August 22, 1923, at 9:30 A. M., at the same place.

[fol. 415]

Duluth, Minnesota,
Wednesday, Aug. 22, 1923—9:30 a. m.

Pursuant to adjournment, the parties met and the hearing was resumed as follows:

Mr. Carmichael: Mr. Carman, if we can break in for a moment we will offer an exhibit, showing the complete detail used by Mr. Warren in arriving at his estimates for passengers for the last six months of 1923 and for the year 1924. You are right at that point.

Mr. Carman: Very well, go ahead.

Mr. Carmichael: Mr. Warren, during the latter part of yesterday afternoon you were testifying concerning your estimates of the number of passengers to be carried in future, ending with the year 1924?

The Witness: Yes.

Q. Do you have in detail the methods used by you in arriving at such estimates?

A. I have.

Q. And the detail that you have, is that true and correct in so far as it purports to show the actual number of passengers carried as shown by the books of the Company?

A. It is.

Paper marked Complainant's Exhibit Number 35.

Mr. Carmichael: We would offer Complainant's Exhibit 35 in evidence and then ask Mr. Warren to explain the matters in detail to the Master so that the exhibit will be fully understood. I think it is now, but it will take some study for one not familiar with it to see just exactly the method Mr. Warren used.

The Master: It may be received.

A. You want me now to describe this exhibit, state what it is?

Q. Yes. Possibly you might place this in front of the [fol. 416] examiner there and work with him so that he will understand it as you go along. The exhibit consists of three sheets, being pages 1, 2 and 3.

A. The first column of the typewritten sheet shows by months the average number of revenue passengers carried in the years 1919, 1920, and 1921.

The Master: You took the total number of passengers for three months, January, for instance, 1920 and 1921, and divided it by three?

The Witness: Exactly, exactly. That gave an average total number of passengers for those three years of 28,702,-571. Those three years were unaffected by changes in the rate of fare or any other unusual temporary condition which might affect the riding in those months. The main purpose of this was to get, not the total for the year, but the relative number in each month of the year. There is a certain relation between the different months of the year that is fairly constant. With that we compared the actual number of passengers carried in 1922, in the second column. That was shown to be 10.90 less than the average for the preceding three years. The third column shows the actual passengers carried down to and including the month of June. It shows an estimate for the month of July of

2,100,000, but the percentage figure as shown by the reference mark, percentage 15.44, is computed on the actual number of passengers carried in July, which was ascertained after we had made up the first part of the sheet. We did not change the figures in the column but computed the 15.44 per cent on the actual number carried in July. In the remaining months shown on the third column is given the estimate for those months in 1923. The fourth column shows the percentage of figures of the 1923 passengers as [fol. 417] estimated and as actual up to July, and it is shown to be 11.72 per cent. In the fifth column was shown the estimated number of passengers by months in 1924, disregarding any additional passengers that might be carried by reason of the putting in operation of the two extensions. And as a matter of fact it disregards only the second one, practically, the East Ninth Street line in September, October, November and December. The figure 25,337,845 in the third column shows 40,000 passengers less than the total estimated passengers for the year 1923, 40,000 being our estimate of the additional passengers that would be carried in the last four months of 1923 on the East Ninth Street line. The fifth column showing 25,115,000 shows the number carried, disregarding the 10,000 per month which would be carried up to August first in 1924, that same 10,000 and 5,000 additional that would be carried on the Kenwood Avenue extension in the month of August, and the 5,000 which we would carry additional on the Kenwood line in the last four months. The last column shows the 25,220,000 that would be carried including all those carried on the two extensions. And then, in order to show that more clearly, we carried it out on the blue-print which is just below, showing by different lines and different characters the curves indicating the number carried in 1919, 1920, and 1921, by the heavy curve, the average of those three years. And then underneath is shown the number carried in 1922 in the solid line. The number that has been carried in 1923 up to and including the month of June by the broken line, and that line is projected in two—it is divided into two lines there, one showing the number which [fol. 418] would be carried if the rate of decrease as compared with the three preceding years—the average decrease of the three preceding years—was continued at the same rate as during the first six months of the year which

is 9.36. The part of the line which goes below the unbroken part of the line shows the actual number that was carried and the difference between those lines shows a decrease of 4.12 which may be considered to be due to the increase in the rate of fare.

Q. That is the figure you have previously estimated as 4 per cent, the rate of decrease as near as you could get it, from your experience, the decrease is 4.12 per cent?

A. Yes. *Yes.* In other words, that decrease of 4.12 is the difference between the 1922 passengers, if continued exactly at the same rate of decrease as the last six months of the year, and in the first six months, and the actual passengers carried in 1922 actually being 4.12 less than the number continued at the same rate of decrease. We found that the figures of decrease in 1923 from the month of January and July inclusive—that is the decrease as compared with the three-year average—was 1,762,851, which was at the rate of 10.47 per cent; but that that decrease had been growing larger, being 13.12 in May; 14.93 in June; and 15.40 in July. Our estimate for the last five months shows a decrease, excluding 40,000 carried on the East Ninth Street line, compared with the second year of operation, in the last four months, of 13.66. In 1924 our estimate is 12.5 under the three-year average. The third sheet, being the blue-print, merely shows the curve continuously from year to year, its estimated proportion being shown in the broken line and the actual passengers up to July, 1923, [fol. 419] being shown in the solid line.

Mr. Carmichael: I think you may inquire, unless Your Honor has some questions to ask concerning this exhibit.

Cross-examination.

By Mr. Carman:

Q. Mr. Warren, on this Exhibit 35 you have set up in column one the average passengers per month and the total average per year over three years, being 1919, 1920, and 1921?

A. Yes.

Q. And in column four you have set up certain percentages of decrease under the three-year average which relate back in your computing upon that column one?

A. Yes.

Q. It is a fact, is it not, that these three years set up in column one are the three highest years of revenue passengers, the years in which the largest proportion of revenue passengers was carried by the Company, than any three years in its history?

A. Yes, that is true.

Q. And the years 1919 and 1920 were particularly high because of the various—the remaining war-time industries which still carried passengers that were not normally in Duluth?

A. Yes.

Q. And the total average for those three years of passengers carried is 28,702,571 as shown at the bottom of column one on Exhibit 35. Now the percentages shown in column four as to decrease, if computed upon a normal average for three years, would be practically cut in two, would they not?

A. I don't know how we could get a normal average for the three years. There would be less, of course, if we could eliminate the traffic which was due to those war conditions that you speak of. But I don't know how we could get a normal average for those three years. We are taking the [fol. 420] average as it was and the purpose of this was merely to show that the relative traffic in the various months of the year would have the same——

Q. There is no reason to suppose that these percentages of decrease set up in column four would ever apply to any other three years except these years 1919, 1920, and 1921, which did contain that abnormal amount of traffic?

A. I don't know that there is any reason to suppose that.

Q. There is nothing in the present prospects of the Company to indicate that at any future time there would be any corresponding reduction in the number of passengers, to the reduction now existing as compared with this high average of 1919, 1920, and 1921?

A. I don't know of anything to indicate that.

Q. And at that time during the years 1919, 1920, and 1921, the jitney competition was practically nil?

A. Yes.

Q. And the jitney competition as a factor has been a real factor only since putting into effect of the six-cent fare?

A. Oh, no; I would not say that.

Q. Your Company estimates that it is now losing more than 2,000 revenue passengers per day by the jitney competition, does it not?

A. I do not know that I have made such an estimate as that recently. That would not be very far, however.

Q. Prior to the six-cent fare it was not losing more than one or two hundred per day for the same cause?

A. Yes, I think there was a greater loss than that. It happened that just at the time the fare increase took effect the paving of Superior Street was concluded. During the time that Superior Street was torn up the jitneys were forced on to First Street and we have not a record of the number they carried, but there were four jitneys running in 1922 and I think they ran all winter several, and all the [fol. 421] winter in 1921 and 1922 and before the Superior Street track was torn up they were running on Superior Street all the spring, but during that time, May, June and July, were driving on First Street, and we have no record of what they carried, although they were in operation.

The Master: Does that include bus passengers?

Mr. Carman: Not to any outside points in the jitney service. I am referring to that which is in competition with the Street Railway Company. I take it that we need not include buses for outside points because their fares are presumably higher than Street Railway fares.

The Master: How about the bus between here and Superior?

Mr. Carman: I take it that the bus to Superior would be part of the competition.

The Master: Does the estimate include that?

The Witness: Yes.

The Master: With what effect?

The Witness: As I said, I have not made any estimate of 1921, that I recall, but that would not be far from what I would estimate as to what the jitneys are now carrying and have been carrying and were carrying perhaps on First Street.

Mr. Carmichael: That question would take you back to the time when there was one jitney. Check back. You have only checked from 1921 down.

A. In the year 1915 we had what we call the jitney invasion, during which year there were over thirty jitneys

running along our lines on Superior Street. During that year I would estimate that we might have lost two million passengers by reason of the operation of those jitneys. [fol. 422] They operated throughout the year 1915 and part of the year 1916 and at that time our fare was five cents. They were running for five cents and apparently they gave up, wore out their cars and found they could not operate for a five-cent fare. In fact, they were making very, very short runs, running mostly where the traffic was mostly congested, and at a time and place where the street-car traffic was mostly congested, and they were unable to survive, apparently, and they gave up. However, our average at that time was considerably in excess of three miles per passenger and they were carrying passengers about a mile.

Q. So Exhibit 35, of course, does not refer to anything as far back as 1915. You say they gave up the jitney competition, and when did it commence again?

A. It commenced in 1921.

Q. That was during the time that the application of the Company for increase in fares under the Brooks-Coleman Act was pending?

A. I haven't in mind the date the application was made.

Q. And was it not also after the elections had been held to determine whether or not by popular vote the City would consent to a six-cent fare?

A. I have not in mind the dates of those elections.

Mr. Richards: They were in 1920, weren't they?

The Witness: I could get those dates by referring to memorandum, but I haven't them here.

Q. I notice on Exhibit 35, the last column, estimated revenue-paying passengers for the year 1924, which includes estimates, does it not, for the increased passenger service on three extensions for a part of the year?

A. The figures in that column excluded a total of 105,000 passengers estimated to be carried on the two new extensions.

[fol. 423] Q. Oh, they include those?

A. Yes.

Q. A total of 105,000.

A. They are included in the last column, which you will notice is 105,000 greater.

Q. Those three extensions I noticed by the heading estimate when completed a total increased revenue-passenger traffic of 30,000 a month, does it not?

A. No; 10,000 per month on the Ninth Street line and 5,000 per month on the Kenwood Avenue line.

Q. Are there only two extensions in here?

A. That is all I have.

Q. And they show an increase of 20,000 per month, then, which may be expected after the extensions are completed?

A. No, no; 15,000 per month.

Q. Then that estimate of 15,000 per month or 180,000 per year may, of course, be taken into account as reflecting the future passenger traffic of the company, as an addition to the estimates included for a part of the year, figured for 1924, which will be left after the extensions are completed. My point is that from that time on, from the time of the completion, that the number of revenue passengers from this source added may be expected to be 180,000 per year, or 15,000 per month?

A. I can only answer your question in this way, by saying that in 1925 following there would be a further addition of 5,000 per month, for the first five months of the year, or 25,000 passengers. That would be by reason of the Kenwood line operating all the year of 1925 and we show only the last few months of 1925.

Q. That is, it would be eleven months more than in 1924?

A. Yes.

Q. And all of these estimates shown by Exhibit 35 are based on a straight six-cent cash fare?

A. Yes.

Mr. Carmichael: Well, you mean by that from this time on?

[fol. 424] The Witness: Yes.

Mr. Carman: And it may also be assumed that if jitney competition were eliminated entirely there would be an additional number of revenue passengers amounting to about 730,000 per year.

The Witness: That 2,000 was your estimate, not mine; I am not sure of that.

Mr. Carman, continuing:

Q. I will ask you whether or not those figures 2,000 per day are not the figures which the Company used in a brief filed with the Duluth Chamber of Commerce under date of January 9, 1923? I will add to that question: "used as its estimate of the number of revenue passengers lost to the Duluth Street Railway by jitney competition?"

A. They may have been. I do not now recall the figures given in that brief. I imagine, however, that if that 2,000 was noted in the brief it was a minimum of 2,000. I should say now that my estimate would be higher than 2,000 per day.

Q. And those figures of 2,000 were furnished under your direction, for your part in this brief filed with the Chamber of Commerce?

A. Very likely, very likely.

Mr. Richards: May I ask how much higher you would estimate now?

The Witness: I would say 2,600 per day would be my best estimate of what the jitneys are now taking.

Mr. Richards, continuing:

Q. That will amount to how much per year?

A. 949,000.

Q. We might say about a million in round numbers, just as an estimate?

A. Yes.

Mr. Richards: If I may ask another question, What [fol. 425] would you estimate, Mr. Warren, was the number of passengers that the jitneys had in April, 1922, prior to the tearing up of Superior Street?

A. To the best of my knowledge now, from anything I have here, I would say that in April, 1922, there were being carried somewhat less than the 2,600 per day and there was never as many carried at that season of the year.

Q. Didn't you report to Mr. Gifford the estimate of jitney passengers, for jitney competition for April, 1923, as 18,000?

A. I may have done so. If so, if it was based on the more accurate information than I have here.

Q. That would be, for 50 days, 600 a day——

A. Eighteen thousand.

Q. Yes.

A. That might be.

Q. That is somewhat less than the 2,600?

A. Yes, that is very much less.

Q. Referring to the question of this jitney competition, the revenue passengers lost to the Company by jitney competition are really the short-haul passengers, aren't they?

A. They are, yes, altogether the short-haul passengers.

Q. And the Company carries the long haul, for that reason—that is, a higher percentage of the long-haul passengers than it would if it had all the traffic without jitney competition?

A. Undoubtedly the average haul is increased by the short haul being taken away.

Q. And of course that would logically bring us to the conclusion that the cost per passenger for service, with this element of jitney competition existing, is higher than the cost per passenger would be without it. That is, I say it cost you more per average passenger when your short-haul passengers are eliminated by jitney competition [fol. 426] than it would cost if they were mixed in?

A. Undoubtedly. If you have reference to the statement that I made a while ago as to the average length of the haul, I will say that that is based on observations made at a time when there was no jitney competition, in 1919, it is somewhat larger than that now.

Q. I only touch on the matter to show that the jitney competition is affecting the average cost per passenger for service rendered.

Mr. Richards: If I might be allowed a question, Mr. Warren, don't you think that the jitney competition would be lessened, materially lessened, and that the revenues of the Street Railway Company would be materially increased each year, if the car riders had the option of riding for five cents?

Mr. Carmichael: That is objected to, as to the form.

A. That is really two questions.

Mr. Richards: All right. Answer it in your own way.

A. I think that if the fare were five cents it would tend to decrease jitney competition. I do not, however, think that the revenue of the Company would be increased with the fare at five cents.

Mr. Richards: Then when the Commission here gave the people in its order an option to ride if they wanted to by paying five tickets for a quarter, if they had been allowed to do so under the order and had not been restrained by the injunction issuing from the Federal Court, do you not think that the Company would be facing the situation of 2,600 revenue passengers per day riding jitneys?

The Witness: Oh, that might make some little difference [fol. 427] in the jitney competition. How much, I don't know.

Mr. Richards: And if the Commission's order had not been interfered with by injunction in the Federal Court, but had been put into effect and given a test, would not the revenues of the Company have been materially increased over what they show in fact after the injunction order was issued?

The Witness: Well now that is—I do not believe that they would. As to jitney competition and rate of fare, my observation is that jitneys are much more affected by street paving than by rate of fare, that the rate of fare does not have so much to do with it, if the City paves the street, and makes a nice runway for them, they flock there, they have got to get pickings.

Mr. Richards: Another question:

Q. You are also manager, of course, of the Superior division?

A. Yes.

Q. And sometime ago, I think in 1921, the rate of fare was increased there from five to six cents?

A. Yes.

Q. And didn't the revenue of the Company immediately decrease?

A. There was very little change in the revenues of the Company in Superior at that time, and as I now recall it it was impossible to attribute whatever change there was to the increase in fare. It had, as I remember it, less effect on the ridings than we expected, but there are so many

other conditions that it was very difficult to ascertain just what the effect of the increase fare was in Superior.

Mr. Richards: I will ask you what the effect was upon the increase of jitney competition by putting in the Superior division the six-cent fare?

[fol. 428] The Witness: As I now recall, there was jitney competition before the fare was increased and it continued after the fare was increased. Now there might have been some increase in the amount of jitney competition, but I haven't the figures available now and cannot say how marked it was.

Mr. Richards: Isn't it your opinion that further increase in the rate of fare would cause the jitney competition to increase in Superior?

The Witness: I don't think there is any doubt that it would tend that way.

Mr. Richards: And wouldn't it do so in Duluth, also?

The Witness: I have no doubt it would have that tendency in Duluth.

Mr. Mitchell: Assuming that the City would make no efforts to control the jitneys?

The Witness: Yes, assuming the City continues, as now, making no effort to enforce the ordinance.

Q. In making that statement are you assuming that the City has any legal right by legislation to eliminate jitney competition?

A. No, I am not. I did not have that in mind at all. I am only referring to daily violations of the existing ordinance, that that was on the part of jitneys.

Mr. Carmichael: I suppose it is true that if the City of Duluth would construct the roadbed and rails and maintain it and keep it up for them that they could operate it at much decreased cost and therefore get a reduction in fare that way?

The Witness: Yes, that is true.

Mr. Richards: That would relieve you from any contract obligation to do any paving yourself. It would be a [fol. 429] very nice thing if that were done.

Mr. Carmichael: That is exactly what you are doing for the other fellow.

Short Recess.

[fol. 430] Mr. Carman, continuing:

Q. Taking up now Exhibit 21, Mr. Warren, this exhibit is an estimate, by months of the number of revenue passengers which would be carried in 1924 in your opinion, with a seven cent cash fare if four rides were sold for twenty-five cents?

A. Yes.

Q. What percentage of the decrease did you use in arriving at those figures, over the figures shown in Exhibit 20, being an estimate based upon a six cent cash fare?

A. These figures are, to the figures shown in Exhibit 20, as 94 is to 96.

Q. As 96 is to 100——

A. No, as 94 is to 96.

Q. That is practically 2%?

A. Yes—less.

Q. Referring to plaintiff's Exhibit 22, which is your estimate by months of the number of revenue passengers which would be carried in 1924 with 7 cent cash fare, which shows a further decrease in the number of passengers, what percentage did you apply in making that computation?

A. Substantially 2% further decrease.

Q. It is a further decrease, that is the same ratio as on the last?

A. Yes. This decrease would be as to the figures on Exhibit 21 as 92 is to 94.

Q. Exhibit 23, being statement of net additions, by months, to property values January 1 to December 31, 1922, is merely a computation and statement of your actual capital expenditures as you classify them, made during that period, added to the general property?

A. Yes.

Q. And the same thing may be said as to Exhibit 24 which covers the period of January 1 to June 30, 1923?

A. Yes.

Q. That is, it is the company's figures of what it claims [fol. 431] proper capital expenditures added to the previous expenditures made——

A. It is in every way the same as the preceding exhibit except that it may not be as accurate, being taken at the middle of the year during the progress of some under-

takings, and it probably is a less amount than has actually been expended, or had been actually expended at that time. And on the other hand it may include some small items that are not, strictly speaking, proper capital charges, but this is very near to what the capital charges will be necessarily when they are adjusted for the next six months.

Mr. Carmichael: That is, you are referring now, as near as you could ascertain at the time this statement was ordered?

A. Exactly.

Q. Referring to Exhibit 25, your estimate of capital requirements from June 30, to December 31, 1923. I notice that the second item in this estimate reads "Completing relaying of pavement with granite toothing blocks, Superior Street, Third Avenue East to Eighth Avenue $13,725.48. I will ask you if that item is not very properly chargeable to depreciation reserve?

A. The part that is shown there I think is a proper capital charge. That work consists in putting in granite toothing blocks where there are no special blocks before, nothing but paving brick, and to the extent that it is an improvement, which represents additional cost, it is a proper capital charge. This is not the total cost of the job.

Q. You mean to say then that in arriving at this figure, $13,725.48, you make an apportionment of the total cost, [fol. 432] and that this figure represents what you think the extent of the granite toothing paving block division is, from the beginning of the pavement that was there before this granite toothing block was laid, is that correct?

A. It was my best estimate of what the improvement to the property by reason of that undertaking, would amount to.

Q. In making up your accounts, and charging amounts to capital expenditures, do you always include the estimated value of an improvement in a replacement as part of the capital expenditures?

A. I don't know that it could properly be called an estimated value of the improvement, but what we do is to so adjust the capital account that when we are through it will properly show the added cost.

Q. Do you mean to say, as to this particular item here, that the kind of paving which you are putting in there costs $13,725.48 more than it would cost to replace it with the kind of pavement that has been taken up?

A. No, I do not mean to say that. I have not convenient now the detail on which that figure $13,725.48 was based as an estimate, but it was intended to show as accurately as possible the total improvement to the property, or additional value by reason of that job, not only with the paving blocks themselves, but we are putting in new rail there. We are practically rebuilding that track.

Mr. Mitchell: Mr. Warren, is some part of that total cost charged to depreciation reserve and the balance to capital?

A. Oh, yes, yes, this is not the total cost of that undertaking.

[fol. 433] Q. What I am trying to get at is whether you have estimated here, or generally estimate some value on replacements as an improvement and charge that to capital account, capital expenditure?

A. I don't know that I can state that any more clearly than I have. Maybe I can make it plainer in this way: at any places where you are making replacements you are necessarily putting in new property or new materials for the old worn out or obsolete materials and replacing them.

Q. Now does the company contend that these new materials have some value that should be charged to capital expenditures, and that only a part of their costs should be charged to the depreciation reserve?

A. Yes, it does.

The Master:

Q. What is the total of that cost, on that item?

A. I have not it here. I could get it very easily.

The Master: It includes $13,725.48?

The Witness: Yes, that very clearly would.

The Master: And the excess over that amount you charge to your depreciation reserve?

A. Yes.

The Master: Have those figures been furnished to the state or the city, those estimates?

The Witness: No.

Mr. Carmichael: Not this exhibit, except as furnished the other day.

Mr. Richards: That is, do I understand the figures showing the total cost have not been presented to us, but merely the company's estimate of what ought to be added to capital account as a deduction or left over?

[fol. 434] The Master: I suppose the details of those things, Mr. Richards, are available to you if you desire to examine them?

Mr. Mitchell: Yes.

Mr. Richards: Yes, I so understand.

The Master: Of course that ought to be, I don't know how I can accept these conclusions unless they are admitted or the facts upon which they are based are given.

Mr. Mitchell: These are like any other estimates for the future, they are simply estimates.

Mr. Richards: My purpose was merely to get the figures by which those figures were arrived at, so that the court could give them proper weight.

The Master: I suppose these particular matters are not involved in the order at all, but my understanding is that wherever the commission came to a conclusion and stated the conclusion on which they based their order, it is prima facie correct. Now I think if that conclusion is to be contested the basis of the facts upon which it is made ought to be offered in evidence and not simply a contention by another conclusion.

Mr. Mitchell: There is nothing in the Commission's order that fixes this.

The Witness: I would like to add in further explanation of this exhibit that in making it up its only purpose was to give approximately the estimated capital requirements for the remainder of the year. I have omitted from that exhibit perhaps a half dozen small jobs that might have been included, and it may be that these figures are not accurate, I do not pretend that they are accurate, but I think that there is no doubt but that all the future jobs were included—if they were all included—they would be under rather than over the actual results that would be shown at the end of the year, when we get our work complete and our accounts adjusted.

The Master: I want to say further that, without reference to whether or not this should be included in the rate base, as long as they are presented here by the plaintiff I think there out to be findings on the amount of these ad-
[fol. 435] ditions to capital, during such years, so that the question will be squarely presented to the Court as to whether or not they ought to be included.

Mr. Carman: I presume that is true.

Mr. Carman, continuing:

Q. Your next item renewing platform and building coal bin at head of inclined railway does that figure $10,859.21 represent merely an apportionment of the renewal which you charged to capital account after allowing the other part of the cost to depreciation reserve account?

A. I cannot be positive as to that item, whether that is the total cost or not, but I am sure that if it should be the total cost there would be sufficient number of items entirely omitted to more than offset that. But I am not sure about that small item. I am sure when the work is done and our accounts are closed the accounts will show only the improved portion in capital and that the remainder will be charged to renewals.

Q. Now your next item of $12,250.00 for making over ten cars into front exit cars, did you charge that cost of making into front exit cars to capital expenditures?

A. Yes.

Q. All of it?

A. Yes.

Q. Changing location of tracks at the Point of Rocks, an item of $6,000. Do you regard that job as capital expenditure, the cost of that job?

A. Yes, I would.

Mr. Richards: I might ask, what is that? Has there been any definite requirements set out that involves the change of that location?

A. Yes, the City Council has adopted a resolution and sent us a certified copy in which the company is required to take up its tracks on Michigan Street, or Pierpont Avenue and Superior Street between Thirteenth Avenue West and Fourteenth Avenue West and relay it on Michigan Street.

[fol. 436] Mr. Richards: By that do you mean that that is an entirely new location for placing that track?

A. No I do not mean that. It is intended to be a temporary location for the track on which the cars will run during the time the city will cut away these rocks. I was unable at the time of making this estimate to ascertain just what the city's plans were but I talked with the supervisor of public works, and as nearly as I could ascertain from him there would be an expenditure of not less than $6,000 required by the company to accommodate itself to that condition.

Mr. Richards:

Q. Does this have any reference to any removal of tracks while they are renewing that platform that fell down from that Point of Rocks there?

A. No it has no reference to anything that is past. That is an estimate of what will have to be done.

Mr. Richards: What you did at that time I understand was paid for by the city?

A. The city paid for it, yes.

Mr. Richards: But this involves a temporary suspension of the operation of the tracks at that particular point in order to enable the city to blast away and make steps at that Point of Rocks.

A. No not exactly. This contemplates a permanent change in the location of the tracks on property that the city, I understand, is now condemning, the street to be widened and we would be required to permanently change the location of that track.

Mr. Richards: I have no particular knowledge of it.

[fol. 437] The Witness: It came to us two months ago. It is not my understanding now that it is intended to require, while the council did order us to remove our tracks to Michigan Street—I understand there are a number of plans now, but there is no thought that there will be any plan adopted requiring the change of tracks to Michigan Street, as was first intended.

Mr. Richards: Well this will be temporary.

The Witness: No. The plan as I understand it is to widen the street at that point and permanently locate the tracks. I have been unable to see, I have not seen the

plans and the commissioner told me last time I talked with him that the plan to be adopted was not decided upon.

Mr. Richards: Then you really have not any accurate basis for an estimate of this capital expenditure.

The Witness: Not very accurate. I used the best information I could get.

Mr. Carmichael: You have been ordered by the city to do the work, however?

The Witness: Yes.

Mr. Richards: Any definite time for the commencement of that work stated?

The Witness: I believe the resolution requires it to be done immediately. I don't know whether the word "immediately" was used or not.

Mr. Richards: Is there any likelihood that the city will pay that expense they put upon you to accommodate these parties?

The Witness: You can answer that better than I can.

Mr. Richards: Is that one of the obligations that the company assumed?

The Witness: It would be very nice if the city were to absorb that expense.

[fol. 438] Mr. Carman, continuing:

Q. Going back to Exhibit 23. This Exhibit 23 is your statement of net additions by months to the property value from January 1 to December 30, 1922, and the second item on this exhibit is track and roadway, which item totals $84,-163.91. That was for the relaying of track on Superior Street was it not?

A. Superior Street and Second Street and such other tracks as were relaid, mostly on Superior Street and Second Street.

Q. It included others besides Superior Street?

A. Yes.

Q. And was that the net amount left after giving credit for disposing of your salvage?

A. Yes.

Q. Can you tell us what the Superior Street job itself cost?

A. It cost $114,992.67.

Q. On the Superior Street job?

A. Yes.

Q. Now how did you get at this figure of $84,163.91 on Exhibit 23, item 2, track and roadway?

A. $62,811.72 of that was the part of the cost of the Superior Street job. The remainder is made up of other jobs mostly.

Q. Now in that estimate of cost you divide your journal entries into several parts?

A. Yes.

Q. What are they?

A. The Superior Street job costing $114,992.67, was divided into two parts, $62,811.72, being one part which was charged to additions or to capital, and $52,180.95 (I have not verified those figures, to see whether they make the total)—was charged as old cost or to renewals, that is replacements—to that expense which was replacement.

The Master: That means it was charged to depreciation reserve?

A. Yes.

[fol. 439] Q. Mr. Warren, do you not have in your journal entries for this job, the Superior Street job, these figures: Road equipment $38,985.82; Depreciation reserve $21,181.34; Reserve depreciation $9,401.77, making a total of $69,568.93, and following that with an entry for salvage of $1,884.90, making a grand total of $71,453.83?

A. The total of those figures which you gave me is the total of the part of the cost of that job which constitutes the relaying of the tracks alone. That cost us $71,453.83, and while I haven't it here, the figures you give me represent the journal entries in connection with that portion of the cost of that Superior Street job. I cannot say that they do show the journal entries because I have not them here, but that is only one portion of the amount that I gave you. I gave you as the cost of that job not only the cost of the double tracks renewing, but the renewing of the loop or part of the loop at Eighth Avenue West, one end of it, the renewing of the special work at Third Avenue West, the renewing of the special work at Lake Avenue, and of the special work at Third Avenue East, and the cost to the company of the new paving on Superior Street $21,006.30.

Q. Now taking these figures which I have quoted, as the

journal entries, it is a fact that they would show a credit of $38,985.82 as entirely new capital expenditures, out of $69,568.93?

A. If the journal entries are as you state, they would show an addition to capital of $38,985.82.

Q. Yet it is a fact that when the job was done you do not have any more property than you had before, any greater amount of physical property?

A. Yes, we have a greater amount of physical property. [fol. 440] We do not have any greater length of track. We have a much heavier rail and we have in many respects more property.

Q. You have a heavier rail. You have newer stones or bricks, but except in that respect your property is the same at it was before.

A. Except that it was reconstructed at a much higher cost than the original.

Q. And that higher cost is figured in here with the capital expenditures, $38,985.82?

A. The capital expenditure portion of that represents the cost of reconstruction undertaking, less the cost of the property which it would replace.

Q. Capital expenditure is, you say, the cost of reconstruction of the item, less the cost of the property which it replaces?

A. Yes. In other words the capital account is correct, brought down to date as to that particular item, that particular piece of property.

Mr. Mitchell: Your books always reflect the cost so far as they show capital?

A. Yes.

Mr. Mitchell: And you simply correct your books by taking out of your capital account that which was charged against this particular rail, and adding to capital account what the replacement of that rail cost?

A. Yes.

Q. Is that the method approved by the Interstate Commerce Commission?

A. Yes.

Q. And the method required by that Commission?

A. Yes.

Q. And also required by the Minnesota Railroad and Warehouse Commission?

A. Yes.

Q. Going now to Exhibit 26, this is a statement of material and supplies on hand for the Duluth Street Rail- [fol. 441] way System on June 30, 1923 and is apportioned between the Duluth and Superior Divisions, showing that in the Duluth division $5,501.06, that an apportionment is made upon that basis of 70.61 to Duluth and 29.39 per cent to Superior?

A. Yes.

Q. Is that, in your judgment, a fair basis of apportionment of the property of the system.

A. I would not say that it is the best or fairest basis of the apportionment of supplies, but it would not differ much if it were made on any one of a number of bases such as the mileage on operation or some other basis; it was the basis we had used in our accounting, and we used that for that reason.

Q. It was the method satisfactory to the company in keeping its accounts?

A. Yes.

Mr. Carmichael: And this was the method that was agreed upon by the engineer of the city and the company as the best method to divide those items?

A. It was considered a satisfactory method.

Mr. Richards: As I understand it, your answer goes to the question of whether in dealing with the whole system, the apportionment of the Duluth division on that basis of the cost of the property as a whole as of December 31, 1922, would be 70.61?

A. I don't get that.

(Question read by the reporter)

Q. To make it plainer: in other words would you say that treating the property of the whole system as one, the cost of the property of the Duluth division as of that date would be 70.61?

A. Yes.

Q. That of the Superior system would be consequently 29.39?

A. Yes.

[fol. 442] The Master: Is that the actual cost of the property?

A. The book cost.

Mr. Carman, continuing:

Q. Coming now to Exhibit 27, being an estimate made by you of the capital requirements for the year 1924, referring to the third item reading, additions, general office building, to provide additional office rooms, store rooms, garages, office, employees' waiting and recreation rooms, $199,800.00. Will you please explain in detail what that estimated expenditure is for—in further detail?

A. It has been the desire of the company, it has planned for many years to build an addition to the present office building, or continue the building back to First Street, in order to provide very much needed office room, to provide comfortable quarters for the employees when off duty, to provide garages, store rooms, office for the station foreman who now has, perhaps, a little space in the car house, out by one of the tracks, and for such other general uses as a building of that kind might be put to.

Q. And you consider a portion of this building would be used for employees' waiting and recreation room?

A. Yes, a very considerable portion would be used for that.

Q. And the building so constructed would be used by the employees of the entire system, Duluth and Superior divisions both, would it?

A. No I would not say it would be used to any extent of the employees of the Superior Division.

Q. The addition to the office building would be so used for both divisions, would it not?

A. Yes, yes.

Q. The same would be true as to the next item, additions [fol. 443] to general repair shops $99,330?

A. Yes, that addition would be used to some extent for repairing cars used in Superior.

Q. And the same thing would be true to some extent of item 2, referring to concrete pits in car houses, $11,500?

A. No, not at all.

Q. That would not?

A. No.

Q. That is not a part of the same building?

A. No, Superior has its own car houses.

Q. You have an item improvements and additions to rolling stock, $49,000 estimated. Did you make the estimate that that is the amount to be required for strictly capital expenditures after you had charged to depreciation the proper amount of improvements?

A. It is estimated on that basis.

Q. You also have an item of probable requirements apportioned to the year 1924, $46,250 for relaying tracks as required in street improvements ordered by the city of Duluth. Do you estimate that the cost of $46,200 would be in addition to and after charging your depreciation account the full amount that should be charged?

A. Yes.

Q. And it is your judgment that the total of this capital requirements for the year 1924 is $487,880, is it?

A. Yes

Q. In your estimates so made of capital requirements for the year 1924, you are considerably above the estimate given by Mr. Robertson, president of the company, in his estimate, are you not?

A. I don't recall that Mr. Robertson testified as to the company's requirements for 1924. I do not recall his testimony in that respect so I cannot say whether it is above it or not.

[fol. 444] Q. Referring now to Exhibit 28, is this Exhibit 28 your estimate of capital requirements for ten years next succeeding the beginning of the year 1924, ending December 31, 1934?

A. Yes.

Q. On what basis do you arrive at this figure?

A. In making that estimate I took into consideration the capital expenditures in the last thirty years and attempted to make as close an estimate as I could of the probable capital requirements for ten years. I did not necessarily an estimate.

Q. It is necessarily very largely guess?

A. Well, of course it would be subject to all sorts of changes and conditions that we cannot foresee, but it was the best estimate that I could make.

Examined by Mr. Richards:

Q. Mr. Robertson, as I recollect it, Mr. Warren, in his statement in regard to capital requirements, for that period, stated that in his judgment it would be about $100,000 a year. I asked him how he explained the conflict between your testimony and his. Did you discuss the matter with him?

A. Why I had talked with Mr. Robertson some about the probable capital requirements for ten years. I did not know that he had testified to $100,000. That may be his estimate.

Examined by Mr. Carman:

Q. Referring to Exhibit 29, which is a statement of your estimate of operating income as estimated for the year 1924 on a fare of six cents cash and five tickets for 25 cents, assuming that 7.6% of the passengers would pay cash, and 92.4% of passengers would buy the tickets, and in this exhibit you have set up in red figures, the deficiencies which [fol. 445] you claim would result in the return upon several different valuations and rates of return. And in arriving at these deficiency figures you have followed the same principles and made your computations and allowances for depreciation reserve and for all operation expenses in the same manner as you did in reference to Exhibit 5?

A. Yes. The operating income as shown on that statement is arrived at by applying the same methods of accounting as in the previous exhibits.

Q. At the bottom of this Exhibit 29, the last entry, the computation of the deficiency on a value of eight million dollars, and a return allowed of 8½%, which you would compute to show a deficiency of $550,694.36, isn't it a fact that if a rate of fare were allowed upon such valuation and such rate of return and sufficient to wipe out the deficiency which you have stated in your opinion would exist, such rate of fare would be so high as to drive the passengers away from the street car and cut down its revenues rather than boost them.

A. I cannot say as to that. I am not at all sure that it would and I cannot say that it would not.

Q. Do you have any idea how high this rate of fare would have to be to yield that amount?

A. No I have not. I have not considered that.

Q. Referring now to Exhibit 30 which is a compilation purporting to show average rate of cash fare charged by electric railways in 275 cities of over 25,000 population. I call *your attention to the fact that the highest* average figure contained in this exhibit is of November 1st, 1921, 7.46 cents, and ask you if it is not a fact that from that [fol. 446] time to the end of the compilations here made the trend has been downward?

A. That is a fact. It has been slightly downward.

Examined by Mr. Richards:

Q. Mr. Warren, isn't it a fact, that those rates in effect in 1921 have been materially increased in many cities of the United States, growing out of the necessity of the readjustment from war conditions, through appeals to commissions or otherwise in having readjustments made?

A. There were a great many very high increases at that time and there have been some drops from those, but just why such increases were made I cannot say.

Q. And why the raises were made?

A. I cannot pretend to say why the raises were made.

Q. It was a fact, wasn't it, that there was a general complaint of conditions of street railways growing out of limitations of the war conditions in their purchases and contracts and some street railways got into the hands of receivers?

A. Yes, I believe that is true.

Q. And a lot of trouble arose from that and became subject of congressional investigation to determine how the remedy could be furnished? And isn't it a fact, in your knowledge, that it is the custom of State Commissions throughout the country to grant increases on the petition of street railways where they have had the power?

Mr. Carmichael: Are you including the Minnesota Commission in that, or just speaking generally?

[fol. 447] Mr. Richards: It might include the Minnesota Commission in that.

A. I know there are a great many raises of considerable amount——

Q. My point is this: isn't it a fact that any reference to existing street car affairs in the year 1921, actually reflects

rates made at the peak prices and as a result of the peak of prices and the peak raise?

A. Your question is that any compilation must reflect that?

Q. Yes.

A. Why of course it must.

Mr. Carman: I am through with my cross-examination.

Mr. Richards, continuing:

Q. I would like to ask you to state the sources of revenue relating to non-operating income.

Mr. Carmichael: Well then please note an objection and exception. Our position is that non-operating revenues have nothing to do with this.

The Master: I do not know what the non-operating income is, except that Mr. Warren said yesterday, and from what property it is derived.

Mr. Carmichael: We have no objection to furnishing it, but it is not material to this case. If you know, Mr. Warren, you may state.

Q. I will ask you to state. I don't think it appears in the evidence yet. What was the company's showing of non-operating revenue for the year 1921, from all sources?

A. It was $20,595.65.

Q. And what was the non-operating revenue for 1922 from all sources?

A. I have no information as to the non-operating revenue [fol. 448] for 1922 here.

Q. I might ask, by referring to the annual report filed with the city of which this is a copy (handing witness paper).

A. Well taking it from the report to the city for the year 1922, it would be $20,217.72. That, on this report, is not entitled non-operating income, but I believe it refers to the same thing.

Q. I will ask you what those items of 1922 were made up from, what sources?

A. They are made up from income from lease of road. I do not now recall just what that is.

The Master: How much was that item?

A. $296.50.

At this point a recess was taken until 2 P. M., at which time the hearings were continued as follows with Mr. Warren on the stand.

Examination by Mr. Richards (continuing):

Q. I was asking you, I believe, Mr. Warren, to state the sources of non-operating income for 1922 and you had this paper in your hand as a memorandum for the purpose of assisting you. That is supposed to be a copy of the annual statement filed with the city auditor of Duluth?

A. I have not verified the amount shown in this report $20,217.72, to see if it is the exact and actual amount shown as non-operating income by our record for that period, but I assume it to be the same.

Q. I see. Will you please state the sources of the non-operating income to the best of your knowledge and belief for 1922?

[fol. 449] A. The first item is income from lease of road $296.50.

Q. From the lease of road. What do you mean by that?

A. I have not ascertained just what that does represent.

Q. Well you don't know just what that is?

A. No.

Q. What is the next?

A. Income from funded securities, $5,210.03.

Q. What funded securities are therein referred to?

A. All the funded securities owned by the company.

Q. Have you a detailed statement of those?

A. I have not.

Q. That could be made and furnished here, could it not?

A. Yes, it could be.

Q. Will you do that?

A. Yes, sir.

Q. And the next item is what?

A. Income from unfunded securities accounts.

Q. And the amount?

A. $2,882.59.

Q. What class of securities is in that list, unfunded?

A. Well, as the title indicates, it would include any unfunded securities that the company might own.

Q. Whatever they might buy?

A. Yes, whatever they might buy.

Q. Will you furnish a detailed statement of that item?
A. As of that date?
Q. Yes, 1922.
A. Yes.
Q. Then the next item is?
A. Income from sinking fund and other reserves. That is $11,752.84.
Q. And the next item?
A. Miscellaneous income.
Q. The amount?
A. $75.76.
Q. Making a total as above stated?
A. Yes, $20,217.72.

[fol. 450] The Master: Those are the items not included in any of the income?

Mr. Carmichael: Not in any of the operating income.

The Master: Not in any income account?

A. The items I read are items from the company's report to the city, and I assume that they will represent the same items shown in our account as non-operating income.

The Master: But all other income whether from rents or chartered cars or any others you have mentioned through there, is included?

Mr. Richards: That is station and car privileges, rent of equipment, rent of buildings and other equipment, power and miscellaneous.

The Witness: All those other items are included.

Mr. Richards: Chartered cars, mail revenue, passenger revenue.

The Master: That would be in Exhibit 9?

Mr. Carmichael: That is in nine, ten and eleven and in every exhibit that we have put in for operating income.

Mr. Richards: Now, does the company hold in its reserves any of the bonds which are stated to have amounted to $2,516,000 at the time of the Commission's order, taking it as of that date, to produce that amount.

Mr. Carmichael: Just what that is was testified to with definiteness by Mr. Robertson, the exact figures in the exhibit.

Mr. Richards, continuing:

Q. My point is this: are you crediting your non-operating income with what you would otherwise pay out of the five per cent, providing that the bonds were held by outsiders? Have you taken in the bonds of that kind that were formerly [fol. 451] so held, and still are crediting the company with that amount of income, five per cent on any such bonds?

A. Do you refer to bonds that have been cancelled for the sinking fund?

Q. If cancelled you would not be claiming income on them?

A. No certainly not.

Q. Unless you do as a matter of fact——

A. I simply want to know what you refer to.

Q. I am assuming that if a bond has been cancelled, you would not be claiming any income from those bonds unless you were crediting those in some way with what you otherwise would have paid as interest and are not paying. What is your practice in that regard? Is any such interest on cancelled or uncancelled bonds in this account of non-operating income, for 1922?

Q. There may be some bonds of the company in one of the reserve funds, a few of those bonds,—and the interest on those bonds would be charged exactly the same as interest on any other bonds.

Mr. Carmichael: Mr. Richards, Mr. Warren has stated he will get you the detail on that, and let us get it accurate rather than what Mr. Warren may think it is now. He will get you the details.

Q. That is fair, only I would like to have a detail of the sources of the income.

A. Yes, I can get —.

Q. Calling your attention to page 9, of this little book of exhibits, do you recognize that as being a copy of the statement made as an exhibit of the Street Railway Company before the Railroad and Warehouse Commissioners?

A. No I don't. I could not say whether that was it or [fol. 452] not. I would have to compare it with our files. It appears to be a copy of our exhibit.

Mr. Carmichael: Our exhibit before the Railroad and Warehouse Commission numbered 20-1.

Q. How about page 11, do you recognize that as one of the exhibits or a transcript of the same offered by the Duluth Street Railway Company before the Railroad and Warehouse Commission?

A. I do not recognize it.

Mr. Carmichael: I think that was prepared by Mr. Gifford.

Mr. Gifford: Yes, that was prepared by me.

Q. Well we will pass that. I call your attention to page 12. Do you recognize that as a transcript of the company's general balance sheet as of January 31, 1921, apportioned to the Duluth Division as an exhibit introduced by the Duluth Street Railway Company before the Railroad and Warehouse Commission?

A. I think I have in our files our exhibits in that case.

Mr. Carmichael: If you will wait a while and let us take these it will save time.

Mr. Richards: I think very likely.

Mr. Carmichael: Yes page 12 was our exhibit before the Railroad and Warehouse Commission.

Q. How about page 13 which is endorsed Exhibit 19, was that your exhibit before the Railroad and Warehouse Commission?

A. Yes, it was.

Q. Now about page 14, marked Exhibit 20, was that your exhibit before the Railroad and Warehouse Commission?

Q. It was.

Q. How about page 15, endorsed Exhibit 18, was that [fol. 453] your exhibit before the Railroad and Warehouse Commission?

A. Yes.

Q. And page 16, endorsed Exhibit 14, was that your exhibit before the Railroad and Warehouse Commission?

A. Yes.

Q. And page 17, endorsed Exhibit 12, I think it is, was that your exhibit before the Railroad and Warehouse Commission?

A. Yes.

Q. And page 18, endorsed Exhibit 13, is that your exhibit before the Railroad and Warehouse Commission?

A. Yes.

Q. Page 19, endorsed Exhibit 11, is that your exhibit introduced before the Railroad and Warehouse Commission?

A. It was.

Q. And I call your attention to page 20 which is endorsed, it does not seem to be endorsed as an exhibit, but was it an exhibit by you before the Railroad and Warehouse Commission, a statement of income for the year 1921?

Mr. Carmichael: Well I don't think it was introduced that way.

(A group of exhibits marked City's Exhibit A, being pages 1 to 19 inclusive.)

(A short recess.)

Mr. Richards (continuing):

Q. I show you City's Exhibit B, and ask you what that is, Mr. Warren?

A. It appears to be a bundle of papers, not numbered as to page at the time of the hearing before the Commission.

Q. And does the index correctly refer to the nature of the documents therein presented?

A. Yes.

Q. And this was information furnished, based on the company's written record?

A. Yes.

[fol. 454] Q. Do you recollect whether this was information presented to the Commission or not at the hearing, actually?

Mr. Carmichael: It was not introduced in evidence, Mr. Richards, I will vouch for that.

The Witness: I don't think it was furnished at the time of the hearing but subsequent to the hearing.

Q. At the hearing on January 10?

A. Yes it was furnished to the city attorney on request made during the hearing, after the hearing.

Q. You believe it to be a true statement of the facts appearing from the records of the company?

A. Yes, I do.

Q. I might ask, Mr. Warren, when you would expect to have the detail in regard to the revenues including the class of non-operating income——

A. I would think within an hour.
Q. In the morning will be all right, tomorrow morning.
A. Well we will have it in the morning, yes.

Mr. Richards: Then we have nothing further at this time.

Redirect examination.

By Mr. Carmichael:

Q. You have an Exhibit marked 14 which has not yet been offered in evidence?
A. Yes.
Q. That is headed as operating income, estimated for the year 1924 at the various rates of fare showing the rate of return upon the Commission's valuation of $4,599,978.22, as of December 31, 1921, and cost for subsequent additions to property added thereto. The first column will you please state upon what basis that is figured, the presentation that you used.
A. The first column is based on a rate of fare of six cents cash, five tickets for twenty-five cents.
[fol. 455] Q. At the Commission's rate of fare?
A. At the Commission's rate of fare, and upon the assumption that 7.6% of the revenue passengers would pay the six cent fare, and that 92.4% would use the tickets.
Q. That is the Columbus experience?
A. That is the Columbus experience, and that results in an average fare of 5.076¢.
Q. 5.076¢ as an average rate of fare?
A. Yes sir.
Q. It shows the average income for return on 1924 on that rate of fare how much?
A. $89,305.64.
Q. You have taken the Commission's valuation and added net property additions for 1922 and 1923?
A. Yes.
Q. Reaching a valuation upon which to make the return of $4,058,715.60?
A. Yes.
Q. And upon a 7½% return allowed by the Commission you should then receive, available for return, the sum of $364,403.67?
A. Yes.

Q. And you have a deficiency on that rate of return of the figures shown in red of $275,098.03?

A. Yes.

Q. Now you have carried that on down at eight per cent of the valuation and 8½% on the valuation?

A. Yes.

Q. Now have you assumed in these tables that the normal riding habit would be 100% at the Commission's rate of fare?

A. Yes.

Q. Which would be for the year 1924, according to your estimate, $26,270.833 passengers?

A. Yes.

The Master: You have not here the average rate at which you compute this 26,270.833 passengers?

A. The average rate of fare?

The Master: Yes.

A. It does not say that but it would be computed from 5.076¢.

[fol. 456] Q. Your next column is figured on 6¢ cash fare?

A. Yes.

Q. And you figure on 4% reduction in the riding habit due to increased fare?

A. Yes.

Q. Giving the estimate for 1924 on 6¢ fares of 22,220,000 passengers?

A. Yes.

Q. And the remaining computations are made the same as in column one?

A. Yes.

Q. Your third column is 7¢ cash, four rides for a quarter?

A. Yes.

Q. Yielding an average rate of fare of 6.4¢?

A. Yes.

Q. Has that been the experience in cities where that rate has been applied?

A. Yes.

Q. And you have figured there on a 6% reduction in the riding habit from the normal 100% which you have used at the Commission's rate of fare?

A. Yes.

Q. Which would give in 1924, 24,694,583 passengers?
A. Yes.
Q. And the rates in column three, are figured on the same method as columns one and two?
A. Yes.
Q. And in the first column you have figured 7¢ cash fare?
A. Yes.
Q. Figuring an 8% reduction from the normal riding habit 33 of the Commission's rate of fare?
A. Yes.
Q. And that arrived at the number of passengers for 1924 of 24,169,166?
A. Yes.
Q. And a balance of column four is figured by the same method as you used on columns one, two and three?
A. Yes.
Mr. Richards: You may inquire.

[fol. 457] Examined by Mr. Carman:

Q. Mr. Warren in all this Exhibit 14 the only figures that anywhere appear which were ever made by the Minnesota Railroad and Warehouses Commission are as follows, are they not: the figures opposite the words "Commission's Valuation as of December 31, 1921, $4,599,978.22" and the figures "7½%" as relating to return, and the figures "6¢ cash five tickets for 25¢"?
A. Those were all mentioned by the Commission in its order. I do not know that there are any other figures there.

The Master: Was your question the only figures mentioned by the Commission?
Mr. Carman: The only figures ever made by the Commission.

Mr. Carman, continuing:

Q. This estimate in column one, under the heading 6¢ cash, 5 tickets for 25¢ is not estimated upon the figures used by the Commission as to the number of cash passengers and the number of ticket passengers, but is based entirely upon the figures testified to by the witness here from the Columbus, Ohio Railway Company, is not that true?
A. That is true.

Q. So that that column does not show anything in the way of estimates as to what would be realized upon the Commission's basis for division of cash and ticket fares?

A. It does not.

Mr. Carmichael: Do you mean it does not show the estimate made by the Commission?

The Witness: I mean it does not show any estimate based on the Commission's estimated division between tickets and cash fares. In fact I didn't know that the Commission had made any such division. I don't think it is mentioned in their order.

[fol. 458] Mr. Carmichael: It is a fact that long before you ever heard of the fares in Columbus it was your computation, from your own personal experience and knowledge, that yo uestimated that it would be 95% ticket passengers at the Commission's rate and 5% cash passengers?

A. Yes, that was my estimate.

Mr. Carman: Yes. We will have some interesting evidence along that line a little later.

Mr. Carman, continuing:

Q. Now in this estimate under column one where you arrive at the conclusion that there would be only an operating income available for a return on $89,305.64 for the year 1924, on a basis of 6¢ cash and five tickets for a quarter, you have used as your rate base in making that figure the figures shown on this exhibit after the words "Commission's valuation as of January 1, 1924," that being $4,858,715.60?

A. Yes, those words I remember.

Q. And those figures, instead of being the Commission's valuation as of January 1, 1924, are the Commission's valuation as of December 31, 1921, plus the amounts which the company has credited on its books as capital expenditures for the time subsequent to the Commission's order and down to the end of the year 1923?

A. That might be somewhat more accurate to put it that way.

Mr. Mitchell: You say the Commission's valuation adjusted to January 1, 1924, that would be it?

A. Yes.

Mr. Mitchell: The above detail shows exactly what is done?

A. There can be no question what is intended by it.

Mr. Carman, continuing:

Q. In your estimate of railway operating expenses for the year 1924 you arrived at a figure here stated to be $1,176,859.65. What is there to justify your estimate that [fol. 459] there will be an increase in the railway operating expenses to this account over the actual expenses shown as far as you have shown them in the exhibits that are already introduced in evidence?

A. That estimate of operating expenses is based on the present expenses for the year so far, and the expenses as estimated for the next eighteen months, and it does not show a very material increase over the expense for the first part of 1923. There is an increase in 1923 as compared with 1922, a very material increase by reason of the higher wages. Then in 1924 there would be two lines in operation that are not now in operation; and there are several items of expenses that are now running higher than they did in 1922.

Q. You do not expect that labor costs will be any higher in 1924 than now, do you?

A. I don't know, I am not, in this estimate, assuming that they will be higher. If they are higher the estimate is too low.

Q. And you don't expect the cost of materials used for maintenance will be higher in 1924, on the average, than they are now, do you?

A. I have not, in that estimate, allowed for any such increase.

Q. You have allowed, in making this estimate of railroad operation expenses, you have allowed your usual depreciation reserve of approximately three per cent?

A. Yes.

Q. And you have, in reaching your final conclusion here, also allowed for taxes, the sum of $80,482.19. Is that more or less than the taxes you paid on the last payment of taxes, for the last year that you have paid them?

A. That is practically the same as the taxes shown in the expense for 1922, and exactly the same as we have esti-

mated it for 1923 based on the same tax rate and the same [fol. 460] tax valuation.

Q. Then that is, you paid those taxes of 1922 exclusive of the income tax?

A. That is exclusive of the income tax. There was no income tax with that amount of revenue.

Q. There was an income tax in 1922?

A. Yes. I did not however, include it in making this comparison.

Q. Now in making your calculation under column two, under 6¢ cash fare, you followed out substantially the same method as in column one, except as therein indicated in the difference in result?

A. Yes.

Q. The same thing is true of column three, on your computations on the 7¢ cash and four tickets for 25¢?

A. Yes.

Q. And the same thing is true of column four, with 7¢ cash fare?

A. Yes.

Q. The whole matter of railway operating expenses in this exhibit is, of course, an estimate, and that necessarily precludes any consideration of the same by the Railroad and Warehouse Commission.

A. It is an estimate. I can answer the first part of your question. It is an estimate. As to whether it precludes consideration of the Commission, I cannot answer that.

Q. There would be no chance for any adjustments, in other words. I think that is all.

The Master: I wish you would tell me what the Federal Income tax is?

A. In this estimate it is computed——

The Master: I mean the actual.

A. We are required to pay 12½% upon our net earnings.

The Master: You are required to pay that much on net income?

A. Yes, there is no graduated rate. It is a fixed rate.

The Master: Then why do you say there would be no in- [fol. 461] come tax on this, if your net earnings were as you have given them, for 1924?

A. We don't show the net earnings, we show the operation income, but out of that $89,000 there would be, in other words, a large deficiency.

The Master: That is what I am trying to find out. Your net income is different from your net operating income?

A. Oh, quite different.

Mr. Mitchell: Operating income, less the interest charges.

The Master: Operating income less interest on bonds?

A. Yes, interest on the bonds and other accounts.

Mr. Richards: I understand you have not told in any of your exhibits the non-operating income——

A. That is true—non-operating income has no effect upon the tax as here computed because it is not included in the inventory.

Mr. Mitchell: You do not claim the right to deduct from this operating income the Federal tax which you pay for the non-operating income?

A. No. To make it entirely clear I might say that the actual tax paid would be somewhat in excess of the amount shown here. This is not the actual amount.

Mr. Mitchell: That is, it would be about 12½% of your non-operating income?

A. Yes, in addition to this.

The Master: I understand that it is conceded that in computing Federal Income tax it is to be computed at 12½% on any excess of net operating income over and above interest. I want a memorandum of that in the record so I won't get it mixed up again.

Examined by Mr. Richards:

Q. Mr. Warren, there is another question I would like [fol. 462] to ask. In the statement filed with the City Clerk for Income and Outgo for 1922, there is an item of Twenty-two thousand and some odd dollars for legal expenses for the year 1924. I would like to have you explain that charge. I am a little curious to know just what that is.

A. The amount charged to legal expenses for 1922 is, $22,197.26, and that covered all of the legal expense of the company during the year,—the payments for legal services.

Q. Does that mean for instance you have an account for injuries and damages. Does that include anything that you paid out for legal services in that class of action?

A. No, it does not.

Q. Then I will ask you to state what does this item of $22,197.26 consist of for the year 1922?

A. It consists of a charge to legal expense and a credit to expense account of $18,000; another charge of $3,000 from current bills; a charge of $1,058.69 for the Minnesota Railroad Warehouse expense, or expense in connection with that,—legal expense; and $13,857.00 for miscellaneous charges.

Q. I presume the item of $3,000 for expense, Railroad and Warehouse Commission means the bills that they presented to your company under the authority of the Brooks-Coleman Act?

A. No, it does not, not $3,000, that was $1,058.69.

Q. Well what was the nature of the services rendered there? Is that their right to claim under the Brooks-Coleman law for expenses incurred by them?

A. I think that is a part of the allowance to the Railroad and Warehouse Commission. How much of that—this does not show me just what that is.

Q. Well then there is another item of $18,000. Explain the nature of the services or expenditures underlying that, if you please.

[fol. 463] Well that covers so many items of service that I could not enumerate them all; it was in full for services in all our litigation. That is the amount applicable to that year.

Q. Well do you consider that a normal expense, an average expense? Does the history of the company show that that is what their average, normal usual expense is for such services?

A. I should hope that the amount of legal services in the last few years would not continue indefinitely.

Q. What is that?

A. I don't know that it would continue indefinitely. But I hope not. There has been some necessity for legal services constant for several years.

Q. Do you consider that a normal annual charge?

A. It seems to be normal under the present conditions.

Q. Is it going to be the same in 1923?
A. I don't know.
Q. Is it going to be the same in 1924?
A. I don't know.
Q. 1925?
A. I don't know.
Q. Well, in making your estimates of expenses which you have stated here, in numerous exhibits, did you fail to take into consideration an estimate for legal expense?
A. I will have to look up my memorandum. I don't believe I figured legal expenses quite as heavily in 1923 and 1924 as last year. For 1923 they were $22,420.20.
Q. For legal expenses?
A. Yes.
Q. Similar to the item of $18,000 for 1922?
A. Yes.
Q. And what was your allowance for legal expenses, your estimate for legal expenses in 1924?
A. $22,800.
Q. And 1925?
A. I did not make any.
Q. And what was your legal expense figure in your report for 1921?
A. I could not tell you. I haven't them now.
Q. That was an actual expense, you can tell by reference?
A. Well, it could be ascertained.
[fol. 464] Q. Yes. Please do so.
A. I may be able to give it to you here—$10,075.50 was the 1921 charge.
Q. And was that allowed by the Commission, or was it cut in their estimates, in their order here for the expenses for 1922?
A. I don't recall.
Q. Well, you remember their estimate of expenses for 1922 was $1,111,734.00?
A. That is about the amount.
Q. And your estimate of expense was higher than that, but in your estimate for the expenses of 1922 made before the Commission what had you put in comparable with this item of $22,000, stated in 1922, if it could be compared?
A. I do not now recall.

Q. Well you can make a detailed statement of that expense in 1922? Will you please report that to us in the morning with the other things.

A. Yes.

Mr. Richards: All right, I think we will defer any other cross-examination on the question of legal expense until this statement is in. I would like to have you refresh your recollection from the books as to the whole matter dealing with legal expense for 1921, 1922, and 1923.

Mr. Carmichael: With the exception of the information that Mr. Warren will prepare for Mr. Richards tomorrow morning, and with the exception of an exhibit or two which we want to introduce showing the trend of prices, practically down to the month of June this year, and unless we have overlooked something, that is our case. We would like to put Mr. Warren on for Mr. Richards tomorrow morning and introduce this other exhibit. It requires quite [fol. 465] a little time to chart it out and get it made but I think it will be ready in the morning.

Mr. Carman: The plaintiff does not formally rest at this time?

Mr. Carmichael: Not exactly. But you can go ahead. We would like to introduce as a part of our case a certified copy of the complaint.

Mr. Richards: Do you intend to introduce a certified copy of the ordinance on your franchise?

Mr. Carmichael: No, we have not intended to do that.

Mr. Richards: They are referred to in the bill.

Mr. Carmichael: Well, they are in the City's possession. I do not know if we have a copy that we could use. It is all admitted by the answer.

Mr. Mitchell: We want it understood that the order of the Commission is to be deemed in evidence. It is in the record, it is set up and attached to our complaint and is admitted by the Commission in its answer.

Mr. Richards: It is understood, so far as the City is concerned, that it is in evidence.

Mr. Carman: Well, it is not here right now, but it will be in a minute.

Mr. Mitchell: Well, it is a part of the record now. If it is to be admitted in evidence, there is no use printing

it twice. All I want is to be able to consider the order of the Commission as evidence.

The Master: I suppose the pleadings are not evidence, but here is an instrument that is set up and attached to the complaint and admitted by the defendant and it can [fol. 466] be offered in evidence as attached to the complaint.

Mr. Carmichael: As Exhibit 37 then, we will offer a copy of the order of the Commission of July 13, 1922, attached to the complaint.

The Master: The order of the Commission, a copy of which is attached to the complaint, is offered and received in evidence.

Mr. Carmichael: We would also make an offer of our consent to come under the terms of the Brooks-Coleman Act, a copy of which is attached to the complaint marked Exhibit A. It is admitted by the Answer. We offer it as No. 38.

Mr. Carman: No objection.

The Master: That will be received in evidence.

Mr. Carman: We desire to put in the record a motion which may be considered as made at the close of the plaintiff's case and as applying after the additional exhibit mentioned has been introduced, the same as now, before the introduction of the evidence on the part of the defendants. I move the Court to dismiss the action upon the grounds and for the reason that the plaintiff has failed to make out a case showing that it is entitled to any relief in the District Court of the United States for the District of Minnesota.

Mr. Richards: The City joins in the same motion.

The Master: The motion will be denied, if I have any authority to deny it.

Mr. Carman: Exception.

Mr. Richards: Exception.

Mr. Carman: In order that counsel for the plaintiff may be advised, I will state for the record that evidence will be [fol. 467] introduced both by the City of Duluth and on behalf of the other defendants, and that the defendants other than the city of Duluth will adopt the evidence offered on the part of the City of Duluth as tending to show that the order of the Railroad and Warehouse Commission dated July 13, 1922, is not confiscatory and does not invade or violate an constitutional right of the plaintiff as alleged in

the complaint. And this evidence, for that purpose, will be adopted by the defendants, irrespective of its consistency with the findings and order of the commission.

(Short recess.)

[fol. 468] Mr. Richards: I will call Mr. Scott.

J. A. Scott, being first duly sworn, testified as follows:

Examined by Mr. Richards:

Q. Mr. Scott, what position do you occupy at the present time, of an official capacity?

A. Assessor for the city of Duluth.

Q. How long have you occupied that position?

A. About thirteen years.

Q. The nature of your duties, what are they, with reference to the valuation of real and personal property in the city of Duluth?

A. To place a value on personal property as of the first of May of each year, and on real property each two years.

Q. And have you been doing that for the last thirteen years?

A. Yes sir.

Q. And is it a part of your duty under the state law to determine the full value of property?

A. It is.

Q. Real and personal?

A. Yes sir.

Q. Does the statute require the assessor and taxing authorities to deal with the question of full tax value of property?

A. Yes.

Q. And to use that as a basis?

A. Yes sir.

Q. And then when it comes to the actual assessment, they indulge in some classifications?

A. They do.

Q. And those classifications, will you state? Can you give a succinct statement of what those classifications are?

A. I can.

Q. Please do so.

A. Class One consists of iron ore mined, or unmined, which is to be assessed at 50% of its full and true value. [fol. 469] Class Two, consists of household goods and wearing apparel and the articles which go to furnish the home. Such articles are assessed at 25% of the full and true value. Class Three consists of money and other articles, livestock, stocks of merchandise and other articles, both wholesale and retail, office furniture and fixtures, farm machinery. There are some 30 different items enter into Class Three. Class Four includes buildings on railroad right-of-way, street cars, poles and other properties of Transportation Lines of that kind. Also stocks and bonds. This class of property is assessed at 40% of its full and true value.

Q. What classes are you speaking of at 40%?

A. Class Four.

Mr. Richards: At this time, if the Court please, we offer in evidence the General Statutes of 1913 of Minnesota, Sections 1987, 1988 and also Chapter 483 of General Laws of 1913 as supplementary of Mr. Scott's testimony.

Mr. Mitchell: It may be suggested that Minnesota is not a foreign state and that this is a Federal Court in Minnesota, and that the Court takes judicial notice of all the statutes.

The Master: Yes, I suppose so. But I am making a note of those sections.

Q. Prior to your appointment as City Assessor what was your business, Mr. Scott?

A. Real estate business.

Q. In the city of Duluth?

A. In the city of Duluth, yes.

Q. How many years?

A. About 21 years.

Q. And in that business did you make it a part of your concern to take note of values of real estate and personal property in the city of Duluth?

A. Yes sir, real estate particularly.

Q. In any particular part of the city, or all of the city? [fol. 470] A. Particularly in the western portion of the city.

Q. And did you as such real estate agent or dealer and realtor pay attention to the values in other parts of the city other than West Duluth?

A. To more or less.

Q. And is it a fact that after you became assessor you had to turn your attention to the actual value on each and every particular piece of real estate in the city of Duluth?

A. Yes sir.

Q. And have you done that all those thirteen years?

A. I have.

Q. And I would ask you to state generally what means you have taken to inform yourself of the value, and what is your present system in that respect?

A. I have kept a very careful record of every sale which has been made together with the consideration which has been paid for it. Where the consideration was expressed in the deed, if it appeared reasonable, I assumed that that was the true consideration. Where a nominal consideration was given in the deed, I would ascertain from the parties interested the actual consideration and I think I have obtained in that way 98% of the considerations for all the property that has been transferred in the last ten or twelve years.

Q. There is a biennial readjustment?

A. On real property, yes sir.

Q. In the even numbered years?

A. That is true.

Q. What has been your habit of revision each years of values?

A. The study of the values as indicated by the sales for the fou- years immediately prior to the assessment period.

Q. Has it been your system and effort to cover the whole field each biennial?

A. Yes.

Q. And has it been your custom to make changes up or down in values?

A. Yes sir.

[fol. 471] Q. And did it become part of your duty to distinguish between the real estate land proper and the structures thereon?

A. They are valued separately.

Q. So that your duties have compelled you to go into the elements of value of structures as well as the values of land?

A. Yes sir.

Q. And your duties have also compelled you to go into the values of all kinds of personal property?

A. Yes sir.

Q. And your duties have compelled you to go into the question of value of the operating property of the Duluth Street Railway Company?

A. Yes sir.

Q. Both land and structures and their personal property, rolling stock and equipment?

A. Yes sir.

Q. And how long have the consideration of the Duluth Street Railway property been before you?

A. Ever since I have been acting as an assessor.

Q. Has it been usual to have your assessments made and attacked or not attacked by the Duluth Street Railway officials?

A. For several years during the early part of my term or services, the Street Railway Company appeared and objected to the assessment and asked for a lower figure. There was no appeal except possibly to the City Board, until the year 1918 when the whole matter was laid before the Tax Commission in St. Paul.

Q. And were hearings had before the Tax Commission in St. Paul?

A. Yes sir.

Q. Were you present?

A. I was.

Q. Who was present on the part of the Street Railway Company?

A. Mr. Warren and Mr. Robertson and I think Mr. Mitchell and Mr. Carmichael.

Mr. Carmichael: I was not present at that time. Mr. [fol. 472] Mitchell was.

Q. Was Mr. Rechert present at that time?

A. I don't remember whether he was there at that time or not.

Q. Was Mr. Mitchell present at that time as attorney for the company?

A. I am quite confident that he was.

Q. The matter was gone over pretty carefully?

A. Yes sir.

Q. Do you remember some of the contentions made?

A. Yes sir.

Q. State to the best of your recollection what did occur?

Mr. Carmichael: Objected to as incompetent, irrelevant, immaterial, no bearing on this case. The question is now to determine at this time the fair value of the Street Railway Company.

Mr. Richards: This is simply leading up to it.

Mr. Carmichael: I know exactly where you are leading to and what you are after.

The Master: Objection noted.

Mr. Carmichael: Exception.

A. The item of street cars, the valuation which should be placed upon street cars, was objected to specifically. The item set up on the 56 or 57 stocks and bonds was also objected to, the underwriting.

Q. Were the real estate titles objected to, do you know?

A. Not at that time.

Q. Was the question raised as to any franchise value?

A. That is the item that I referred to as stocks and bonds.

(Paper marked City's Exhibit C.)

Q. I call your attention to this and I will say it purports to be a certified copy, certified by the Secretary of the Minnesota Tax Commission, as a protest and statement made by Washburn, Bailey & Mitchell, attorneys for the Duluth Street Railway Company, subscribed to and sworn [fol. 473] to and cerified by Herbert Warren on the 23rd day of October, 1918, of the company's schedules, one endorsed as rewritten October 23, 1918. I show that to the witness and ask him to refresh his recollection and state if that was one of the matters that was under consideration at the time he has heretofore testified.

A. Yes sir.

Q. That protest was the base of the discussion?

A. Yes.

Mr. Richards: I will offer that in evidence, if Your Honor please, relative to this matter.

Mr. Carmichael: Objected to as incompetent, irrelevant, immaterial, not having any bearing on the case and the

further objection that the assessed valuation is no indication as to the fair value or the market value of the property.

The Master: The objection is noted and the exhibit will be received subject to the objection.

(Mr. Richards reads Exhibit C.)

(Paper marked City's Exhibit D.)

Q. I show you this paper which is marked City's Exhibit D and ask you what that purports to be.

A. It is a copy of the report of the Duluth Street Railway Company, setting forth the value of its personal property for the year 1921.

The Master: A report to whom?

A. To the City Assessor.

Q. That is you?

A. Yes, to me.

Q. Is this the original or a copy?

A. This is a copy.

Q. Presented and signed by whom?

A. A. L. Reichert.

Q. That is a mistake, it should be S. A. Secretary and Treasurer.

[fol. 474] Q. Are you acquainted with Mr. Reichert?

A. I am.

Q. Do you remember whether he personally appeared before you at that time?

A. He did.

Q. And did he hand you that original?

A. Yes sir.

Q. And is this a copy of the original?

A. This may be, I think it is.

Q. A true copy of the original?

A. Yes sir.

Q. Was it made in your office?

A. I think it was.

Q. Do you remember the circumstances of his presenting it and filing it?

A. I remember his bringing it to the office to me.

Q. And leaving it there?

A. Yes sir.

Q. And was there a discussion based upon it touching the question of the assessment that you proposed to make against the company for that year?

A. Mr. Warren and Mr. Mitchell, at a subsequent date, appeared before the City Board, when the matter was gone into very carefully.

Mr. Richards: With that, we offer this exhibit, unless there is some objection that it is not the original,—we would offer this in evidence.

Mr. Carman: Objected to as incompetent, irrelevant, immaterial, what the assessed valuation is or may be is no evidence of what the value is for a rate base, and not admissible under the pleadings.

The Master: Is there any objection that this is a copy?

Mr. Carmichael: No objection made on that ground.

The Master: Objection noted, the exhibit received.

Mr. Carmichael: Then, as to all adverse rulings from this side of the table, may we have an exception noted by the reporter, as a matter of course?

[fol. 475] The Master: Yes.

Mr. Carmichael: I understand the other side did not agree to that?

The Master: Yes. Wherever there is objection made to the receipt of an exhibit an exception may be taken to the ruling.

Mr. Richards: I call your Honor's attention to the proposition of the claim that is made in the statement filed, 33 1/3% on class 2, $252,461.00 total value, and the claim for an assessment of $84,164.00, and underneath that a claim of 40% of Class 4, a total value of $1,694,491, with a claim for assessment on the basis of a total of $607,796 and a value in both classes apparently total up $1,946,952, with the assessment corresponding in the opposite figures, $761,950.

The Master: When you come to argue the case I hope you will argue the admissibility of this evidence. Many of your objections will only be urged in court. For instance, the claim of no additions since the Commission's order, should be made. All of those matters should be determined by the Court, in coming to a final conclusion as to the value. I think it is important to know whether the master is at liberty to consider this evidence or not and

I hope you will argue on that. Of course, what I am trying to point out is that where all of the evidence is being received subject to the objection, the situation is not the same as to all the evidence. Now there is a large amount of evidence received here as to what has occurred since the Commission's order, what additions have been made, and matters of that sort. It is hardly necessary that I should determine the questions of law involved in the matter of evidence, because I can make a finding upon that point which places it squarely before the Court; but if [fol. 476] the proposition is up to the Master to make a finding as to the actual value, he must determine what evidence he shall take into consideration on that point, whether he is right or wrong. He must make up his mind on that. I may be reluctantly compelled to make up my mind on this question of law; the first question would be as to the competency of it, and the next question would be the effect to be given to it.

Mr. Richards: I thank your Honor for your statement, because that prepares both sides for a full hearing on that question.

Mr. Richards, continuing:

Q. Now, in regard to this assessment for 1921, Mr. Scott, you reached a conclusion and made an assessment?

A. Yes, sir.

Q. What was this assessment, if you can state it, for the year 1921?

Mr. Carmichael: Objected to as incompetent, irrelevant, immaterial, no evidence of value, no evidence on which to determine a rate base, inadmissible under the pleadings.

Mr. Richards: Do you make a point that the original record is not here?

Mr. Carmichael: Oh no, no.

The Master: The objection is noted and the evidence will be received subject to the objection. That is, as to personal property?

Mr. Richards: Everything in the valuation of the Duluth Street Railway property, both real and personal.

The Witness: I have the 1921 personal property assessment here.

[fol. 477] Q. State the total.

A. The basis of a full and true value upon which the assessment was made was $3,199,486.

Q. Now will you state your conclusion as to the value of the amounts filed?

Mr. Carmichael: Was that as shown by the assessment rolls?

A. The assessment rolls would show the full and true value was $3,199,486, with an assessed value of $1,265,858. The last value, as of May 1st, 1921.

Mr. Carmichael: The same objection as last cited and exception.

Mr. Richards: But not on account of the absence of the original record?

Mr. Carmichael: Well you are reciting what the record says and I am not raising that objection, Mr. Richards, at all.

A. The full value of the land, $88,240.

Q. And the total of the two?

A. Well, I have included the total, the buildings are also included in my total. The land value of $88,240, so that the conclusion follows——

Q. Aside from the buildings?

A. Yes, including them, I have the land and the buildings.

The Master:

Q. What were the buildings?

A. $156,890, a total amount of buildings and personal property of $3,444,616.

Q. Now I will ask you if that assessment was approved by the State Tax Commission?

Mr. Carmichael: Objected to as incompetent, irrelevant and immaterial, no evidence of the value, nor evidence to obtain a rate base.

Mr. Richards: Does that raise a question of the absence [fol. 478] of the record of what the Tax Commission did?

Mr. Carmichael: No, no, no, I am not raising that objection.

Q. All right. State it as adjusted by the Tax Commission for the year.

A. The full amount?
Q. Yes, the full value.
A. I have got it $3,444,616.
Q. That is what the State Tax Commission adjusted for the full value of all the property?
A. That is the full value as finally adjusted by the State Tax Commission. That does not include money and credits.
Q. I will ask you, Mr. Scott, if that was intended to include, as one of the items of value, the value of the stocks and bonds?
A. There is no value placed upon stocks and bonds in this assessment.
Q. You are dealing with the property itself?
A. Dealing with the real and personal property.

Mr. Carmichael: "Stocks and bonds," you use as the assessor uses it *as the assessor uses it* to determine what values there may be in the property over and above the actual physical property?
A. That is——
Mr. Carmichael: That does not mean stocks and bonds that have been locked up in vaults.
A. The law provides that it shall be stated as stocks and bonds.
Mr. Carmichael: That is an element which you treated as evidence before the Minnesota Tax Commission as going concern value, didn't you?
A. Well, I presume that is true.

Mr. Mitchell: I understand this was assessed value of the property, without any reference to stocks and bonds,—$3,444,616?
A. That is the full value.
[fol. 479] Q. The value which you placed on it for the tax purposes?
A. Yes.

The Master: This is the full value?
Mr. Mitchell: This is the full value which he fixed for tax purposes. There is a distinction between full and assessed value, and in which he did not take into consideration moneys or credits, no working capital, no going concern value, no intangibles, no power contract.

Mr. Richards: Did you take into consideration the question of the value of the stocks and bonds in making your assessments?

Mr. Mitchell: He has already said he did not, he has nothing to do with stocks and bonds.

The Witness: If I may state how I deal with that proposition, the law provides that the market or book value of the stock shall be set up as one item, and from that shall be deducted the value of the personal and real property, and the balance shall be set up as stocks and bonds, but the market value of the stocks did not exceed the value of the tangible property, and consequently there was no item to set up under that item.

The Master: You set up the market value or the par value?

A. The market value.

Q. If you set up the market value of this property, would you take it at the par value?

A. No, that is not the way the law provides, as I understand it.

Q. Well at any rate you did not include anything?

A. There is nothing included in there for stocks and bonds.

Mr. Richards:

Q. You mean the stock of the company?

A. The stock of the company.

Q. What do you understand the law to mean by bonds, any assets they may have on hand in the way of bonds?

[fol. 480] A. Not in this connection. They are set up as moneys and credits.

Q. What is your understanding of the law as to the meaning of bonds in this connection, where it says stocks and bonds?

A. The difference between the value of its stock on the first day of May, and of its tangible property,—the difference between the two.

Q. You have stated you reached a value of $88,000 in 1921?

A. Yes.

Q. And relating to the date of July 13, 1922, the date of the Commission's order, I will ask you if in your opinion

there is any real change, or, if so, what, in that value which you place on that property?

Mr. Carmichael: Objected to as incompetent, irrelevant and immaterial. The man has not qualified himself to speak of values. He has merely spoken as to what his records have shown as to assessed valuation.

The Master: Note the objection, received subject to the objection.

A. The only change which I know of would be the sale of one or 2 lots each year valued at a thousand dollars.

Q. So that the valuation at the date of the Commission's order should be reduced——

A. $1,087 and some and dollars.

Q. Calling your attention to an item of $46,000 placed upon an easement in Seventh Avenue West, or the inclined railway, and mentioned in a report of the Board of Appraisals at that value approximately: I will ask you if you took that into consideration in making that assessment against this company?

A. No sir, I did not.

Q. I might ask you why you did not?

[fol. 481] A. I did not consider that there was any tangible property there, either real or personal, which would be seen by the assessor.

Mr. Carmichael: That is the inclined right-of-way.

Q. That the assessor could not see it?

A. No.

Q. Mr. Scott, I will ask you, in view of the statement that there is no value to be attached to that easement, will you express your views on that subject? Explain what this item is, $46,000 in valuation, going into this rate base of the Street Railway Company?

A. I think it would be proper. My idea is that it would be proper that it be placed in the assets for the purpose of rate making, at the cost to the company, at the time they acquired it.

Q. Has that cost any relation to the value?

A. Not to the sale value. I presume it has value to the company, the cost of it.

Q. I will ask you, has there been any appreciable increase in the value of real estate in that locality in the last twenty-five years where this incline runs?

A. Yes sir.

Q. Above Superior Street?

A. Yes sir.

Q. Has there been any corresponding increase there as compared with other places in the city of Duluth?

A. There are many places where that increase has been much more marked.

(Exhibits marked City's Exhibit E, F and G, respectively.)

Mr. Richards: We offer in evidence City's Exhibit E. This is the assessor's statement of personal property, full value, and assessed value for the year 1921 in detail.

Mr. Carmichael: Objected to as incompetent, irrelevant, immaterial, no evidence of value, no proper evidence to be considered in making the rate base, and not admissible under the pleadings.

[fol. 482] The Master: Received subject to objection.

Mr. Carmichael: Exception.

Mr. Richards: We now offer in evidence City's Exhibit F, a statement in detail of the real estate full value and assessed value.

Mr. Carmichael: Same objection as noted to the offer of Exhibit E.

The Master: Received subject to the objection.

Mr. Carmichael: Exception.

Mr. Richards: We next offer in evidence the City's Exhibit G.

(Same objection, ruling and exception.)

Q. This is the valuation of property as reported to the Duluth city assessor. I will ask the witness about it. What is that paper?

A. That is a statement of the value of the Street Railway Company's property as submitted to me.

Q. By whom?

A. By the Street Railway Company, but this is for 1918.

Q. Yes I understand.

A. For the year 1918, by Mr. Reichert.

Mr. Carmichael: It was not submitted in this form was it? This is a computation made by you, is it not, from the figures supplied on some printed form?

A. No not this one, Mr. Carmichael, this includes real estate and personal property.

Mr. Richards: I call your Honor's attention to the fact that the depreciated value as of May 1st, 1919—well I offer Exhibit G.

(The same objection by the plaintiff, the same ruling and exception.

Mr. Richards: I call your Honor's attention to the fact [fol. 483] that the depreciated value as of May 1st is put at $2,399,457.06.

The Witness: I stated a minute ago this is for 1918.

Q. Yes.

A. But this is for the year 1919 instead of 1918.

Mr. Carmichael: Isn't that the same thing covered by a certain exhibit marked D?

Mr. Richards: D, is 1921.

(Paper marked City's Exhibit H.)

Q. What is this statement, Mr. Scott?

A. This is a sworn statement of Mr. Reichert dated June 25, 1918, which sets forth the name of the company——

Q. Never mind the contents. Mr. Reichert is the secretary and treasurer of the Street Railway Company?

A. Yes sir.

Q. What was done with the original of that?

Mr. Carmichael: The original of this you gave to the Railroad and Warehouse Commission, Mr. Richards.

Q. Yes. It was Exhibit H before the Commission. That is a fact. I thought it was produced by Mr. Scott.

A. I had it originally and I think the Railroad and Warehouse Commission have it.

Mr. Mitchell: Mr. Scott has testified that this is a copy but we do not object to it on that ground.

Q. Examine that and verify it if you can?

A. This is a copy of the original as filed by me.

Q. And used as a basis of procuring your office to make an assessment of the property of the Duluth Street Railway Company?

A. Yes sir.

Q. Where is the original?
A. With the Railroad and Warehouse Commission.

[fol. 484] Mr. Richards: We offer this in evidence.

Mr. Carmichael: The same objection as noted to Exhibit E.

The Master: Received subject to the objection.

(Exception by the plaintiff.)

Mr. Mitchell: This is an affidavit as to the tax matters in 1918.

(Mr. Richards reads Exhibit H.)

Mr. Richards: You may cross-examine. I may recall Mr. Scott on another phase of the case later.

Cross-examination.

By Mr. Carmichael:

Q. Mr. Scott, on Exhibit E, is a list of personal property?
A. Yes sir.
Q. Where you state that the full value of the property under the condition in which you found it is $3,199,486?
A. Yes sir.
Q. You did not assess the company as to its automobiles that year, did you?
A. No sir.
Q. What was the value of the company's automobiles?
A. I don't know.
Q. That is the year we were on a wheelage tax basis, payable to the state, and for that reason it does not appear?
A. That is true.
Q. And on Exhibit F, which purports to set forth the description of the company's real estate, you have set off the respective parcels and descriptions of the assessed valuation thereon?
A. Yes.
Q. You have included nothing for the inclined right-of-way?
A. No sir.
Q. Not under the real estate, and in no place in the fig-
[fol. 485] ures you have testified to, have you included anything for what we term moneys and credits, which is ac-

counts receivable, moneys in bank and stocks and securities owned and held by the company?

A. Not in the evidence I have given and nowhere in any of these exhibits. They are shown on one of the exhibits as returned by Mr. Reichert, but none of my exhibits, nor my testimony.

Q. Nothing in anything that you have drawn off of the City's books?

A. No sir.

Q. Or the assessment rolls?

A. No sir.

At this time an adjournment was taken until the following morning at the same place at 9:30 o'clock.

[fol. 486] Duluth, Minnesota,
August 23, 1923—9:30 a. m.

Pursuant to adjournment the parties met and the hearing was resumed as follows:

Mr. Richards: Will Mr. Warren, take the stand?

HERBERT E. WARREN, recalled, testified as follows: on cross-examination:

By Mr. Richards:

Q. Have you made ready for presentation the detailed statement as called for yesterday of the securities, funded and unfunded, and the income therefrom, and of the legal expenses for the year?

A. Do you wish me to give the details now? I don't understand your question.

Q. You have not it in the form of an exhibit?

A. No, I have not.

Q. All right. Yes.

A. The non-operating income for the year 1922 amounted to $20,217.72, as shown by the memorandum you handed me yesterday. One item called income from lease on road, and consisted of an amount received from the Duluth Edison Electric Company for the use of an electric transmission line, a pole from Ninety-second Avenue West and

Grand Avenue West to the junction of Commonwealth Avenue with Spirit Lake Transfer Railway, the amount of that being $296.50. Another item was income from funded securities which was the Duluth division apportionment of interest received from miscellaneous investments as of December 31, 1922, and this amounted to $5,210.03.

Q. Let me see. I think I called for a list of those funded securities.

A. I can give you that. I have not prepared that list. I did not know you wanted that list separately. The interest on those securities—I could, in a few minutes, pre-
[fol. 487] pare a list of the securities from the memorandum I have here. But I would like to defer that until I have these other items, and then I will cast it up.

Q. All right.

A. Another item of income from unfunded securities and accounts. That consisted of interest on bank balances and amounted to $2,882.59.

Q. Now interest on bank balances?

A. Yes.

Q. Those bank balances were produced by the operation of the system, its earnings and deposits from day to day?

A. Yes.

Q. Can you conceive of any legitimate reason then, why that item of $2,882.59 ought not to be counted in as operating revenue, rather than non-operating revenue?

A. No I can not, a part of it, at least. Of course the amount actually consists of interest on an excess over $10,-000 at 2%. In this case we were allowed by the Commission $30,000 working capital to the extent of $20,000 of that I think would be operating income.

The Master: Why not the whole thing if this charge is included as capital.

A. Perhaps the whole thing ought to be included in operating income. We have always treated that as non-operating income. It has always been shown in our accounts as non-operating income.

Mr. Carmichael: It has always been reported to the Inter-State Commerce Commission as such?

A. Yes.

Q. And to the Minnesota Railroad and Warehouse Commission as such?

A. Yes.

Q. And to the City of Duluth in the annual report as such?

A. Yes.

Q. And the details have been shown?

A. Yes.

[fol. 488] Q. But they have never approved of it, not one of them. They simply take the report and say nothing about it, if they ever look at it.

A. I do not know that they have formally approved it.

Q. Was there any statement there to indicate in these reports at any time that that amount of income from unfunded securities came from income from the operating revenue?

A. I am quite sure Mr. Richards, there was a detail of that submitted in the case before the Commission.

Q. All right. Now have you available a list of those unfunded securities?

A. The unfunded securities is merely the income on that item—the entire amount came from interest on the bank balance.

Q. All right. I see. The next item.

A. The next item consists of income from sinking fund and other reserves, the Duluth division apportionment of interest on the general mortgage trust fund, the fund being invested in securities as follows: I have a list of these securities as that is what I understand you asked for yesterday: $193,000 par value, Minneapolis Street Railway and St. Paul City Railway Consolidated 5% bonds; $9,000 Duluth Street Railway Company First Mortgage 5% bonds. $60,000 Duluth Street Railway General Mortgage 5% bonds. $16,000 par value Minneapolis Lyndale and Minnetonka and the Minneapolis Street Railway joint 7% bonds, a total of the amount par value of those securities of $278,000. And the interest included in non-operating income for the year 1922 was $11,752.84. The last item is miscellaneous income, being interest on deferred payments on account; sale of lots in Duluth, amounting to 75.76.

Q. Now I will ask you this question: Did any portion [fol. 489] of this revenue stated to be $11,752.84 come from

the investments made from the depreciation reserve source?

A. No.

Q. Well does not the company seek to invest any portion of this depreciation reserve for the purpose of deriving income from it?

A. No, except through the operation of the property. Depreciation reserve is invested largely in additions to property.

Q. Hasn't it been invested in any securities interest bearing at all?

A. Certainly not of these securities. I do not know that it would be possible to say the amount that came from the depreciation reserve and other amounts.

Mr. Mitchell: The depreciation reserve is merely a bookkeeping account?

A. That is all.

Q. You mean that you actually use the money theoretically, depreciation reserve, and put it in investments and betterments, and improvements, and operating expenses, or any purpose that the company wishes to put it to?

A. Perhaps not. It is not separated from the other funds of the company. The depreciation reserve is merely a book liability, a balance sheet item.

Q. What has been the practice of the company in putting that money into improvements, purchases—new capital?

A. I would be unable to take the money of the company and so separate it into parts as to show which part came from the depreciation reserve fund and which came from some other liability that may be set up on the books.

Q. Do you think it would be fair to the public to theoretically, have a depreciation reserve and then put it into the purchases, by making new extensions and lines and betterments, and then claim the right to have that capital ized, and the public pay you rates on a return annually on that?

[fol. 490] A. I think it is entirely fair to the public that the funds of the company should be used for extensions or lines necessary.

Q. Then the theory of the depreciation reserve is to protect the original capital, isn't it, so that when a portion of the plant wears out and has to be replaced there will be

moneys already taken in operating expenses from the pocket of the public to replace it and keep it up to its one hundred per cent standard of efficiency? Isn't that the theory of the depreciation reserve and the basis of the right to take it out in annual operating expenses, and add to it from year to year?

A. I believe there are many theories regarding depreciation reserve. I don't know that I would feel like stating now my theory of the depreciation reserve, if I have any.

Q. Is it the fact that the history of your company shows that that book account, historical investments, includes moneys taken out—in fact, out of the depreciation reserve and put into the property?

A. Our books don't show, don't segregate the amount derived from depreciation reserve; from any other funds.

Q. Have you any actual money in the depreciation reserve today?

A. No.

Q. Where has it gone?

Mr. Mitchell: Never did have any.

Q. That has gone into the property or into dividends hasn't it, one of the two?

A. No, I don't think any of it has gone into dividends.

Mr. Mitchell: Some of it went into the Ninth Street extension that the City Council ordered us to build.

[fol. 491] Mr. Richards: That is what I want to know. I am a little curious to know whether the public have to first pay out of their own pockets, a rate which calls for a retirement of a certain amount of money as operating expense each year for the purpose of keeping the plant up to 100 per cent efficiency, and to replace it in its original form, or whether the company takes this money out of the people first as operating expense and then goes and puts it right into the property and calls it new capital and readjusts that account on that as a capitalized future base.

The Master: Yes, but if the property has been depreciated in the meantime by the same amount, that would not be duplication of capital, would it? If you started with $100,000 property and in ten years it had depreciated 15%, you have $15,000 in depreciation fund, then you use that fund for buying new property and charging capital and your capital account is still $100,000.

Mr. Richards: Well, put in that form, I don't see that there is any duplication.

The Master: No, if it were done in that way.

Mr. Richards: Yes. But here I don't know how it was.

Mr. Mitchell: The condition per cent, found by the engineers, presuming they find it to be accurate, is the result of twenty or thirty years of experience. The depreciation reserve fund is the result of an estimate of depreciation as made from year to year as the property is going along, and the actual operation would probably always result in a slightly larger amount in depreciation reserve than found in the actual accrued depreciation. No money is set aside in that fund. It would be entirely impracticable on any such basis as this company has carried on. But as claimed by Mr. Warren yesterday, when there is a re- [fol. 492] newal of a given piece of property there is charged to the depreciation reserve the amount at which that property stands on the books of the company. There is charged to capital the difference. The master's suggested that, to be theoretically exact, after a new valuation was found, all of the property should be raised or lowered, whichever it might be, and the amount charged to depreciation reserve on any given piece of property corresponding to that changed amount. I entirely agree; but none of that involves any actual bank account for that depreciation reserve. If there were no extensions, or renewals to make and no limitations upon the rate of return, a case might be conceived of where a company could actually put this money into the bank and have it draw interest. But that has not been done by this company and I do not know any company that does it.

Mr. Richards, continuing:

Q. Just for a moment I will go back to that question of rent from the transmission line. That is a revenue derived from the actual operation of the railroad, isn't it?

A. No, no.

Q. Why not?

A. The transmission line is not used in connection with the operation of the road. It was at one time.

Mr. Mitchell: Is that property included in the rate base?

A. I am not sure whether that is included in the inventory.

Mr. Richards:

Q. Why wouldn't it be? It is property belonging to the company?

A. It is property belonging to the company.

Mr. Mitchell: All the visible property belonging to the company is included in this valuation?

A. If so, then I think that would amount to but a small item anyway, but we have considered it in non-operating income.

[fol. 493] The Master: Cannot we settle that now, if that property is included.

Mr. Richards: It must be.

Mr. Mitchell: It is undoubtedly included in the physical property. I have not noticed that item. We did notice the other item and we all agreed on our side that that income from the bank balance was not proper non-operating income. It is in the 1922 accounts and no part of it is non-operating income.

Mr. Richards: If this property is not used and useful to the public, then it ought not to be in the rate base and therefor it ought not to be drawing any 7½% interest annually.

The Witness: I think that is correct, Mr. Richards, I think that is correct.

Mr. Richards: But whether it is or not we would like to know.

The Witness: I don't know.

Mr. Richards: Well, passing that item, just at present.

The Master: Mr. Gifford is looking that up. Would not it be a good idea to settle this as we go along?

Mr. Mitchell: If that is the part of the property, the value of which is agreed upon, then I would not claim that that belonged there. An argument could be made about the share of an accumulation of the money that the stockholders are entitled to, and all that sort of thing, but it has not been done, and I don't propose to claim that any of this bank balance should be in this account. I think until that is carried out as dividends, it belongs to the company and

if the money came from the operation, that is an operating credit.

The Master: What is the rate of interest?

[fol. 494] Mr. Mitchell: Three per cent on the bank balances above $10,000. As a matter of fact there was an accumulation during 1922—this amount is something more than 3% on $90,000, so there was an accumulation of probably $60,000 more than the Commission has allowed as working capital. The question is what was the actual situation in 1922? And I am not prepared to claim that any part of this should be in this non-operating account. It was actually earned from the moneys accumulated from operation, and as far as 1922 was concerned, I think all of this must go into operating account.

Mr. Richards: Well right there, if I may be allowed to ask on that question, while Mr. Gifford is looking it up, should not the same principle apply to the non-operating revenue of 1921?

The Master: I presume it should.

Mr. Richards: Then your estimates of operating expense of '21 should be segregated to the extent of interest on bank balance in the years of 1920, 1919 and 1918?

A. Of all those years.

Mr. Carman: As to that item, that property was inventoried by both Mr. Drum and Mr. Gifford and a part of the value which Mr. Drum has testified to and that revenue is properly operating income.

Mr. Mitchell: In other words some of those two items should be added to the operating income for 1922. That is the net result of it so far as that goes.

The Witness: And seven-eighths of that amount would be net.

Mr. Mitchell: And are all those of the Duluth division?

A. That is apportioned to the Duluth division.

Mr. Mitchell: That is one-eighth would go to the Federal [fol. 495] government.

The Master: That is the way you conceive that should be treated, Mr. Richards, rather than striking that out of the inventory?

Mr. Richards: If it is not used or useful it should be struck out of the inventory, because it is not used or useful except as a source of revenue.

The Master: Of course that would require taking evidence, if that is your claim we will have to find out about it, if you take the other theory of it.

The Master: Then at the present time that means the item will be taken out of non-operating income and put into operating income, because that is prima facie. If you desire to change it you will have to produce the evidence to change it.

Mr. Richards: We wont spend any time on it. We will consent to that to save trouble.

Mr. Mitchell: And we consent that the income from the bank balance also be transferred to the income account for 1922.

The Master: Now what are those total amounts on— 7/8ths of the amount?

A. It is 7/8ths of these two amounts that should be added——

The Master: To the Duluth proportion?

Mr. Mitchell: The Federal Income Tax on these two items is one-eighth of that, 12½%.

The Master: Well, that is included anyway.

Mr. Mitchell: That is not now included in the amount of the Federal Income Tax, so that the net taxes——

The Master: Well, it will be, Mr. Mitchell, just as quick as that is added to the operating income.

[fol. 496] Mr. Mitchell: Then we will have to increase the statement of the Federal Income Tax by one-eighth of this amount.

The Master: The Federal Income Tax would necessarily be computed on whatever amount is found as the net operating income. If the non-operating income is increased by the transfer of these items, automatically the Federal Tax is increased.

Mr. Mitchell: It means, as I understand it, that in the net results one-eighth would come off of that.

The Master: Yes.

Mr. Richards: The net result.

The Master: That would be the net result, but the total amount should be added.

The Witness: The total amount should be added to the revenue and the 7/8ths amount should be added to operating income as shown and it will make the statements correct.

Mr. Mitchell: Well we all understand it as——

Mr. Richards: Subject to the Federal Tax, however, it is all accounted for. All right.

Mr. Carman: May I ask if the federal tax on that amount has been already paid as a part of the non-operating income of the company, so that it was not charged as a part of the federal taxes, only operating expense that you claim in your exhibits.

The Witness: In all our exhibits showing operating income for the past, we have included taxes, and shown as taxes the actual amount paid as federal income tax. On all our estimates of future operating income, we have computed the federal income tax at 12½% upon net income.

Mr. Carman: What I wanted to get at is whether or not this tax, these items, which have just been discussed, has [fol. 497] been paid as a part of the amount shown for taxes on the exhibits, or has been paid aside from any tax shown on the exhibits as a part of the tax of the non-operating income of the company—the income tax.

A. The Federal Income tax which has been paid has been computed on this item of income.

Mr. Carman: That is what I wanted.

Mr. Richards, continuing:

Q. Now we will go back to this item of $11,752.84, stated by you as the income from the sinking fund and other reserves. What was the amount of the sinking fund on which you estimated income.

A. Mr. Richards, in that heading the words "sinking fund" is only in the heading. It is the name given by the classification of accounts to that subdivision, and there is as a matter of fact no sinking fund reserve included in the figures below. That is all on the general mortgage trust fund. In other words the part of the heading reading "sinking fund" does not apply in this case, only the other reserves.

Q. The other reserves consist of what?

A. The general mortgage fund.

Q. The general mortgage fund?

A. Yes.

Q. Referring to the item of interest on funded debt, which is one of the items reported by you to the City in the original report of which I loaned you a copy yesterday, I noticed $125,744.59 as interest on the funded debt for the year 1922. That was interest of 5% on what amount of bonds?

A. That was the Duluth apportionment, and it would be interest on two and a half of bonds, (million.) It must be, to get that amount.

[fol. 498] Q. As a matter of fact weren't some of those bonds retired during the year?

A. The interest there shown is the interest actually paid.

Q. Actually paid?

A. That interest, however, has nothing to do with this non-operating income. That was not in there——

Q. This $11,752.84 item is interest on $278,000 of invested securities?

A. Yes, belonging to the general mortgage trust fund.

Q. Referring to this item $5,210.03 income from funded securities. You were to give a list of those and we were to defer examination on that.

A. Yes I told you I would give you a list a little later.

Q. Now referring to the item of legal expenses, have you a formal exhibit showing the items in that, that was called for?

A. No, I have not. I have the figures as I understood you asked for the detail of the charge to legal expense or law expense.

Q. Yes.

A. During the years 1921 and 1922.

Q. Yes.

A. In our accounting system there are certain direct charges to the expense account and the remainder is made by charges transferred from what we call an accrual account. In 1921 there was charged to legal expenses $250 being part of the amount paid to the late Thomas S. Wood, for legal services.

Q. I asked this question: yesterday you stated that this item was entirely separate from the legal expense connected with what we understood ordinarily to be retainers and charges for defending personal injury suits?

A. Yes.

Q. Injuries and damages.

[fol. 499] A. I did so state.

Q. That takes care of all the charges connected with that branch of your business?

A. Well, there was during 1921 a part of the compensation of Mr. Wood charged to law expense on account of certain of his duties being other than in connection with the injury department.

Q. All right.

A. The next item was $3,000 paid to Washburn, Bailey & Mitchell for the year. There was an item of miscellaneous charges of which I have no detail amounting to $263.24. The entire remainder of the charges against law expense for that year amounted to $6,562.26 and was transferred from the accrual account. The accrual account for that year started with a debit balance or deficiency on account of expense in past years which had not been charged out, of $4,507.48. There was charged into that accrual account in January $500, being for services of Washburn, Bailey & Mitchell in rate matters. In August $2,000 paid to Washburn, Bailey & Mitchell for similar services. In August a payment to Washburn, Bailey & Mitchell for all services in connection with case pending in Federal Court between the Duluth Street Railway Company, plaintiff, and the City of Duluth, defendant, to May 1, 1921, $1,000. In September a payment to Washburn, Bailey & Mitchell of $1,500 for services in rate matters. That makes a total charge to the accrual account, and there was charged out of that account into the expense account $6,562.26, making a total charge for the year to law expense, $10,075.50, and leaving in the accrual account a balance of $2,945.22, which had not been charged out at the end of the year.

[fol. 500] Q. Now I will ask you about that item of $1,000 paid to Washburn, Bailey & Mitchell in the Federal Court in 1921. What relation had that to the city of Duluth?

Mr. Carmichael: Would you like to have me state it?

Mr. Richards: Yes.

Mr. Carmichael: The city of Duluth on January 10, 1921 passed a resolution ordering us to increase the service by a matter of 10%, and we went into the Federal Court, to restrain the city and you, and have the city of Duluth rescind that order.

Mr. Richards: I remember, that is right. You would not expect that such an expense as that would be normal?

A. I don't see how I could foresee.

Mr. Richards:

Q. It was actual in that year?

A. It was in the expense that year.

Mr. Carmichael: The city can answer that better than I can.

Q. Referring to the item paid to Washburn, Bailey & Mitchell of $500, was that on a rate matter?

A. Yes.

Q. And the $2,000, was that on a rate matter?

A. Yes.

Q. And the $1,500 later, was on a rate matter?

A. Yes.

Q. Making a matter of $4,000 on that. Was that supposed to be in full for services that year on the rate matter which was paid only in part, leaving a part to be adjusted at a later time?

A. I think it was in part. I don't think it was intended to be in full. I think that subsequent payments reached back into 1921.

Q. This matter of legal charges for the year was before the Railroad and Warehouse Commission, was it not?

A. I do not now recall.

Q. And it was considered by it in the question of what would be reasonable operating expense for the year 1922?

A. I do not recall how the railroad and Warehouse Commission treated it.

[fol. 501] Q. The matter of what would be a proper charge for legal services and expenses was necessarily considered by the Commission when it was making up its estimate of what the proper operating expense of 1922 would be, wasn't it?

A. I think it was.

Q. And you made your claims, and the city made its claims and the Commission passed on that item?

A. Well so far as I can recall I merely gave the facts and the figures as I knew them to be. I don't know about the claims.

Q. Now please state the detail of that item total for the year 1922, $22,197.26?

A. In 1922 there was charged to law expense, account 86, $3,000, Paid to Washburn, Bailey & Mitchell. Payments to the Railroad and Warehouse Commission amounting to $1,058.69.

Mr. Bowen: Those were the proceedings prescribed under the law.

A. I so understood. As I understand it, it was for the legal expenses of the Commission. There were miscellaneous charges aggregating $138.57, and the transfer from the accrual account of $18,000, that makes a total of $22,197.26.

Q. This first item of $3,000 to Washburn, Bailey & Mitchell, was that for any specific purpose?

A. No, that was regular monthly retainer.

Q. Now will you please explain the item of accrual account as stated at $18,000?

A. That consisted of a payment in January to Washburn, Bailey & Mitchell for services in rate matters $2,000, and of a payment in December to Washburn, Bailey & Mitchell for services in the year 1922, relative to the application before the Railroad & Warehouse Commission for permanent rate base, attending taking of testimony before the Commission, preparing for argument, and arguing the same before the Commission, preparing and submitting a [fol. 502] brief, preparing a bill in equity against the Railroad and Warehouse Commission, to secure an injunction restraining the enforcement of confiscatory rates, securing a restraining order and arguing the motion for temporary injunction to restrain the Railroad and Warehouse Commission and the City of Duluth from interfering with the company charging a six cent fare, preparing temporary injunction and seeing that same was served, $15,000.

Q. This charge was not split between the services before the Railroad and Warehouse Commission, affecting the rate base, and separated from the charges or bill for services rendered in the Federal Court?

A. It was not.

Q. As there itemized, there stated?

A. It was not .

Q. And I apprehend that you would not feel competent to say just what the proper division should be of that $15,-

000 between the services before the Railroad and Warehouse Commission and in Federal Court?

A. I would not feel competent to make that division.

Q. In other words, you don't know how much of that $15,000 or the company doesn't know how much of that $15,000 was for services intended to join or block or stop the application of the Commission's order?

A. No, I don't know.

Q. And you don't know what would be a reasonable charge?

A. No, no, I don't

Q. But you paid the bills?

A. Yes.

Q. Would you consider that the $3,000 regular retainer had any relation to what the public ought to pay in the management of the Street Railway Company as operating expense?

A. I certainly should.

Q. A general retainer, what is your understanding of what that means?

A. Well in this case it means payment for legal services not otherwise specified, other than special services, miscellaneous.

[fol. 503] Q. Well general retainer means that they are your attorneys for the year on all questions affecting you?

A. Yes.

Q. And that might relate to any specific case that might arise from time to time having no special reference to the City of Duluth or the Railroad and Warehouses Commissioners?

A. I cannot conceive of its being anything outside of a proper operating expense.

Q. Well you also stated did you that in making your estimate of expenses in 1923 you put in the same approximate amount of $22,000?

A. Yes.

Q. And what was the basis for such an estimate of legal expenses in 1923?

A. Estimated entirely on part history.

Q. I know, but what are those facts that you considered as justifying that amount in 1923?

A. Well I do not attempt to foresee just what turn legal matters may take or what form legal services would

be in, or just what matters we would need legal services in. I simply in a general way assumed it would probably be the same as it had been in the past two or three years.

Q. If this present litigation was out of the way would you assume to make such an estimate as that for expenses of 1923-'24?

A. Why, with present indications out of the way and no reason to expect any more litigation I might make a different estimate.

Q. Supposing the various parties to this controversy come to a settlement so that the litigation in the State and Federal Courts are wiped from the slate, what would be a reasonable estimate for legal expenses for 1924?

A. Oh, I would not want to make such an estimate now. [fol. 504] Q. Well you don't consider that legal expense connected with the prosecution of this suit in the Federal Court is anything normal or regular or to be expected every year?

A. I might have felt that three or four years ago, but every year there has been something.

Q. Well it was optional with you, was it not to obey the Commission's order, or take the matter in to the Federal Court and launch a litigation which incurred incidental expense? You didn't have to do it.

A. I presume that is true.

Q. And your right to make any charge depends on the question of whether you have any real matter, that is debatable at least, isn't it?

A. I think that is true of all litigation.

Q. You voluntarily assumed against the presumptions that exist in the due administration of the law of the state?

A. No, I cannot answer that.

Q. You cannot say as to that?

Mr. Carmichael: The question is somewhat argumentative and calls for conclusion.

Q. In the previous history of the company had you ever had any such expense as that that you charged here for 1922 for legal expenses?

A. I don't believe we had quite that much. We had an amount approaching that in a year.

Q. Now I call your attention to an item of miscellaneous general expense stated in a report to the city for the year

ending January 31, 1922, $43,410.81, and would ask you to explain, in a general way, how the items under that amount are made up? That is, you may state under what items or readings or numbers you have placed the various items that constitute that total.

A. I could give you items, not the amounts, but the heads under which—which make up that item in the classification.

[fol. 505] Q. You might do that.

A. It might not agree with the figures shown on the report.

Q. Your answer would tie it up to reports rendered to the Railroad & Warehouse Commission?

A. Yes.

The Master: What year is that?

Mr. Richards: 1922. I am referring to the report for the year ending—filed with the City January 31, 1922, covering the year 1923.

The Master: And is Mr. Warren going to give those details, or have they already been given in this report?

Mr. Richards: They have not been given in this report.

The Master: I did not understand that last question—that he had it before him to identify.

Mr. Mitchell: May I make this suggestion? As I understand, the report to the city does not follow the classification of accounts by the Commission. It is a report to the city and to the Commission. My suggestion is to let Mr. Warren furnish that at a later time and your accountant check it over.

Mr. Richards: If we can save any time I certainly desire to.

The Witness: It would take a great deal of time.

Mr. Richards: Then we will pas- that item.

Mr. Mitchell: The City's blank is not made with the same classification as the Commission's.

Mr. Richards:

Q. I call your attention again to an item in this report filed with the city of $21,741.55, under the head of salaries, and expenses of general officers. I would like to have you segregate expense of the general officers from the amounts paid for salaries, if you can.

A. I could not do that here now. I perhaps could do that later and submit it to you.

Q. The expenses of general auditor, have you an idea of what that would consist?

[fol. 506] The Master: I thought your accountant had gone over all these accounts and that they were all tabulated.

Mr. Richards: I think Mr. McWethy had, but I have not had any reports here.

The Master: If there is any such thing and Mr. McWethy has gone over it, and you can put your hand on whatever item you desire, it would save time. I wish you would get together, you gentlemen of the defense, and do that.

(Short recess.)

Mr. Richards:

Q. I will ask you, Mr. Warren, in your estimate of expenses or your statement of actual expenses for 1922, if that did not include a sum for the Jaeger defalcation?

A. Yes it did include some.

Q. Will you now state the amount?

A. I cannot now state it.

Q. All right. I will also ask you if it did not state as an actual expense the extraordinary expenditure growing out of the extraordinary storm of February 1922?

A. It did.

Q. That was a storm the like of which you had never known anything similar?

A. I think so.

Q. So that if normality was reached in the proper estimate of operating expenses for the year, certainly some adjustment would be necessary on account of the snow and ice item?

A. In the estimates we have put in as exhibits I have taken all those things into consideration, and attempted to base them on normal conditions.

Q. That is in your estimate of 1923 and '24?

A. Yes.

Q. But that did not have any relation to your report for expenditures of 1922?

A. No.

[fol. 507] The Master: 1922 contained actual expenditures during that year?

A. Yes that is correct.

Mr. Richards: Now I will reserve, I think, further cross-examination on items of operating expenses, subject to determination as to whether we will go further into that question after putting in our other evidence.

Examined by Mr. Carmichael:

Q. I want to ask Mr. Warren just one question. Mr. Warren, you were examined by Mr. Richards this morning concerning non-operating income and you gave the totals as to certain bonds and securities held by the company, and the income from such securities, such as interest items were given by you in the non-operating income of the company?

A. Yes.

Q. I will ask if all those securities you testified about are held and owned by the company pursuant to Section II of Article I of the general mortgage of the company reading as follows: "Said Railway Company shall forthwith make, execute and deliver to said trustee the whole 2,500 bonds herein described, and such trustee shall forthwith authenticate or countersign 300 of such bonds, so executed and delivered, numbered one to three hundred, both inclusive, and then redeliver same unto said Railway Company, the proceeds of said bonds to be held by said Railway Company as a reserve fund which may be invested in such bonds, stock or other security as the Board of Directors of said Railway Company determine. Provided, however, that this fund shall not be used for any other purpose than the payment of new property acquired, additions, extensions and permanent improvements under the terms and conditions of this indenture."

[fol. 508] Mr. Richards: Just a moment. What page is that?

Mr. Carmichael: That appears at the bottom of page 15, and at the top of page 16, being paragraph two of Article one of the Trust Deed. All of the interest in that item aggregating over $11,000 was earned—received on securi-

ties held under that provision, and all of the securities specifically mentioned were held under that provision.

Q. All of the securities specifically mentioned in your testimony have been and are held by the company under that provision?

A. Yes.

Q. As a construction reserve fund?

A. Yes.

Mr. Carmichael: That is all.

The Master: Now just a minute. It is understood now that the defendants are to have entire access to the books of the company for the purpose of examining and familiarizing themselves with the facts connected with the operation expenses as reported for the year 1922 in the exhibits presented by the complainant and offer that examination and any of the defendants will be at liberty to continue the cross-examination of Mr. Warren, or present such evidence as they see fit.

Mr. Richards: That is satisfactory to us, but the court will note that Mr. Warren was to introduce a list of funded securities, and for the purpose of further cross-examination on that point, also involving this item of $5,210.03.

The Master: That is, Mr. Warren was to furnish the list that he stated this morning he would furnish?

A. ——.

Mr. Richards: Yes.

Mr. Carmichael: That is perfectly agreeable to us.

The Master: Is that satisfactory to everybody?

[fol. 509] Mr. Carman: That is satisfactory to us.

Mr. Carmichael: Now we want the master to understand that the books have always been available to the city.

The Master: Well I have no other idea about it, but it seems to me there has been a slight misunderstanding and I desire to avoid expressing any opinion as to how any party shall present his case.

[fol. 510] Byron T. Gifford, sworn, testified as follows:

Examined by Mr. Richards:

Q. You, Mr. Gifford, were the person who was employed by the city of Duluth under authority of Chapter 278 Gen-

eral Laws of Minnesota, 1921, yourself and your staff to make examination of the property of the Duluth Street Railway Company, and an appraisal thereof, and as accountant to examine their books and accounts and proceedings for the purpose of preparing yourself to report an appraisement, and the condition of the property of the Duluth Street Railway Company for the benefit of the hearing before the Railroad and Warehouse Commissioners.

A. I am.

Q. I would ask you to state, not necessarily modestly, but state the qualifications that you fairly have, Mr. Gifford, as a preparation for such examination and report.

A. For the past seven years, or approximately that time, I have been acting as consulting engineer in public utility work, considering street railroads, electric properties, gas properties, water works, central heating, and I have specialized in valuation and rate work in that connection. Prior to that for a period of approximately three years I was chief engineer of the American Public Utilities Company and had charge of the operation of their properties consisting of gas, electric light, electric railway, water and central heating properties. Prior to that I was in construction work with Mr. W. H. Schotz, consulting engineer, in which capacity I had experience in the building of electric light plants, gas and some railway experience. I was then connected with the Central Station Engineering Company as chief engineer of the public utility work. We built central heating plants, [fol. 511] electric light plants, water works and gas plants, and also with the American Steam Company, New York, with which company I was manager of the general engineering department, and had charge of their general engineering work which consisted of the building of central heating plants in connection with other utilities. That, in a general way, is an outline of my qualifications. During that time I have made a special study of the accounting and operation of utility properties and have in the past seven years been in something over one hundred rate cases and valuation controversies, in which I think there have been fourtee nelectric railway cases.

Q. Can you name those?

A. The Chicago West Town Traction Company, which operates in the suburbs west of Chicago. Grand Rapids

City Railway, Grand Rapids, Michigan. The Madison Street Railway Company, Madison, Wisconsin. The Sheboygan Electric Railway & Light Company, Sheboygan, of which I was engineer, being operated with the American Public Utilities Company. The urban and interurban properties of Waukesha, Appleton and Green Bay, Wisconsin. The urban and interurban at Eau Claire, Wisconsin. The urban railway at La Crosse, Wisconsin. Special report for the City of Minneapolis, on the Minneapolis Street Railway, the valuation and rate case of the Superior Railway utility, which is the Superior Division of the Duluth Street Railway Company. I think that covers it.

Q. What was done with regard to the Superior Division of the street railway with which you were connected?

A. The first case was an emergency case in which the company's application was for an emergency increase, or at least it was called an emergency case, the latter case, the last one, was a valuation case in which the company's application to the Commission was for a valuation of its property and an adjustment of the rates that were found proper. By agreement, I think that case only went as far as the [fol. 512] valuation. The valuation decision was handed down by the Railroad Commission of Wisconsin and the rate of fare was left for further consideration and that, as yet, has not been settled.

Q. Who was engineer on the other side in the Superior Division rate valuation case?

A. Mr. A. L. Drum, A. L. Drum & Company were the engineers for the company in that valuation work.

Q. So far as the Superior Division and the Duluth Division are concerned, A. L. Drum & Company and Byron Gifford seem to be on the opposite sides for some years past?

A. Well we don't mean it that way. We have both been in the cases, I don't know that we have been on opposite sides, because in both cases we have agreed on most of the factors and the things we could not agree upon were left up to the determining body to decide.

Q. And, as was testified in the opening of this case, that agreement covered the question of unit prices throughout the period prior to the reports and the actual inventories, and you left the matter of difference of opinion to the Commission, where you did not agree?

A. Yes. We agreed on the inventory and the unit prices and left such matters as overhead, going value, working capital, material and supplies,—no we agreed on material and supplies,—and other items to the Commission.

Q. You might on that point there state specifically the items or matters as to which you did not agree, and left for the judgment of the Commission or the Courts.

A. Neither Mr. Drum nor myself made any valuation of the land. That was left for real estate experts, so that the [fol. 513] values I have assumed in my valuation do not agree with his. All items of material and property which could be inventoried, were inventoried and agreed upon, and we agreed as to the unit prices on the four bases asked for by the Railway Commission, which have been testified to by Mr. Drum. We did not agree on the overhead. We did not agree on the working capital, and we did not agree on the going value. After the overheads I have working capital and going value. Mr. Drum has developmental costs, cost of power contracts, and working capital.

Q. Did you disagree upon those items last mentioned?

A. Yes, we disagreed as to those items last mentioned.

Q. What did you do with reference to the Duluth proper division, of this system, yourself and staff?

A. We were retained shortly after Mr. Drum's organization had started to work and we started work with his organization and checked the work that they had done to date. And then both proceeded to complete the inventory, agreeing on each item. After that had been done we then separately worked up our unit costs from the four bases and then made and adjusted what differences were there, which were minor, and both agreed on the unit prices to be used in valuing the inventory we had found previously. We discussed the items of overheads, working capital and other items, and could not agree on them. So we decided to put that up to the Commission, each one stating his views and the facts as he saw them.

Q. You made the actual inspection of all the property involved——

A. Yes sir.

Q. —which were capable of being seen?

A. Yes sir.

Q. That was necessary, I suppose, to arrive at an understanding as to its present per cent condition?

A. Yes sir.

[fol. 514] Q. What have you to say as to the thoroughness of your examination in that respect?

A. We inspected all properties which could be seen and the properties which could not be seen, such as ties, materials underground, the life, or the per cent condition which was based upon the life or the expected life, and the age of the property.

Q. Did you enter into an examination carefully of the life and expected life for each item of property?

A. Yes sir. We considered the conditions in Duluth as to the effect on property. The rail head was calipered, to determine the wear upon the rail; the condition of the track generally was considered, and the probable remaining life in the track was considered as well as the average or normal life to be expected in a situation such as we found in Duluth. The Duluth climatic conditions are beneficial to the long life of overhead construction, and we considered all items of that kind in connection with the appraisal and valuation. The three items, the three general factors that were considered relative to determining the accrued depreciation were the condition of the property found by inspection, the life of the property, the age, the remaining life and the scrap value when that property would be abandoned. So that the depreciation we have given to the property consists of that portion of the property which would be lost, and the scrap value has been considered as staying in the property.

Q. Do I understand you to say that you omitted no item of property with that object in view, determining its actual per cent condition, and a proper estimate of the depreciation based on the elements you have spoken of.

A. I think I can say that we omitted no item of property [fol. 515] and if any was omitted it was of very small consequence.

Q. Did you present to the Railroad and Warehouse Commission a written,—or a statement of the condition shown on those four bases which you spoke of?

A. Yes sir.

Q. And state to the Court those four bases upon which the report was made?

A. They are the same as the bases mentioned by Mr. Drum. The first basis was a valuation based upon the prices in effect in the year 1915. The second basis was based on prices for the ten year period 1912-1921, on average prices during that period. The third basis was based on prices in effect in the year 1921. The fourth basis, prices in effect when the property was purchased or installed.

Q. Who instigated or laid out the program of the different bases for the examination and report?

A. I think it was Commissioner Putnam of the Railroad and Warehouse Commission suggested that we work in out on the four bases and submit that to the Commission. He said that they wanted to have it in form, as I remember it, so that they could compare and have all those conditions considered, and I think he was the one who laid that plan out. At least, he approved of it.

Q. And it was the Commission's action then that made the program for you and Mr. Drum in making your report?

A. Yes sir, that is correct.

Q. Have you the report that you made to the Commission?

A. I have blue print copies of that report. The original report is in the Commission's files, in the evidence taken.

Q. In what form?

A. It consists of two volumes, volumes one and two, called the Report of the Valuation of the property of the Duluth Street Railway Company as of July 1, 1921.

[fol. 516] Mr. Richards: We will have these marked as exhibits.

(Books marked City's Exhibits I and J respectively.)

Q. You may proceed with your explanation and statement.

A. Turning to City's Exhibit I, which is Volune I of the valuation, page 1 is simply a letter of transmittal. Page 2 shows the outline of the four bases. Page 3 shows the summary of basis No. 1. Page 3-a shows a summary of basis No. 2. Page 3-b shows a summary of basis No. 3. Page 3-c shows a summary of basis No. 4. Turning to

Page 3, it will be noted that I have considered the first item, the item of land of $118,094. And as the cost of reproduction and depreciated value, I have the same amount that is found in detail on page 42 of City's Exhibit J, consisting of land owned in Duluth by the Duluth Street Railway Company, and that value is taken from the valuation submitted by Mr. Scott who has testified in this case. I think it checks with Mr. Scott's total value, less two lots that were sold. The other item is $31,754.22, which consists of the cost of obtaining the right of way for the elevated incline railway. The detail of the $86,340 item is shown on page 43, Exhibit J. The details of the $31,754.22 item is on pages 44 and 45 of Exhibit J. This detail as to the cost of obtaining the right-of-way (the word cost may be a misnomer there) but it is a record of payment made for the rights-of-way of the elevated incline railway on and along Seventh Avenue West. The record of payments made for the rights-of-way obtained from the company, from Mr. Warren, Mr. Reichert gave me this list and it was checked over and found to — at least sufficiently correct for my purpose and I have accepted it as being the amounts paid for that right-of-way. It will be noted that it consisted of apparently damages paid in the District Court of St. Louis County, judgment or Commissioners' [fol. 517] award and certain deeds of record where the rights were purchased in a deed. The item of land therefore was not appraised by me, and that value of which I say $118,094 is built up as I have just explained. The item of track, bridges, trestles, culverts, the item of inclined railway physical property, paving, electrical distribution system, rolling stock, sub-station equipment, shop machinery, tools and miscellaneous equipment, buildings, furniture and fixtures, were valued upon the agreed inventory and the unit prices adopted. Turning to page 3-c is the valuation on what is known there as the investment basis, being basis No. 4 of the prices in effect when the property was purchased or installed. In Volume 2, starting on page 41, and extending to page 120, are the details of the items making up the summary shown on page 3-c of Exhibit I which is Volume 1. In the other bases only summaries are used as Mr. Drum and I agreed that that was the proper basis, or the reasonably proper basis to

put this before the Commission, so that I will refer in detail to the methods as to basis No. 4, as that is in detail here. Page 46 of Exhibit J is a summary of the track property which consists of tangent track, special track and other items as shown on page 46. The details follow back to page 61. It will be noted for instance on page 47 the first item is a line on Arthur Avenue from Pine Avenue, to Duluth-Superior bridge, which consists of 476.7 feet of single track, reproduction cost $1,614. Per cent condition 90. Scrap value $143, giving a depreciated value of $1,324. And each piece of track is treated similarly. It will be noted on page 48——

The Master: What is that, depreciation and scrap value?

A. The scrap value does not depreciate. It stays with the property at all times, so it would be ninety per cent of $1,614.

[fol. 518] The Master: I do not understand this.

A. Maybe I can explain it this way.

The Master: It seems to me you have added the stock value to the ten per cent?

A. Well it is true, it is only the value less scrap that depreciates.

The Master: Is that reproduction cost less $1,614?

A. That is the reproduction cost.

The Master: It has lost 10 % of that from depreciation?

A. No, it has only lost 10% of $1,471, because the $143 does not depreciate.

The Master: Then you have deducted from the reproduction cost first $143?

A. Yes.

The Master: And then taken 10% of the balance?

A. Yes. Take the $1,614 reproduction, and deduct from that the scrap value of $143, leaves $1,471. Then taking a 10% depreciation, which is on the depreciable part of the property, it is $147. Deducting that from $1,471, leaves $1,324 as the depreciated value.

The Master: "Isn't this a rather unusual way of estimating depreciation?

A. I don't think so. It is the proper way when you consider a scrap value. There is a rule-of-thumb method considered, without the scrap element entering into it, which I think is not as accurate as this.

Mr. Mitchell: The reproduction cost is the reproduction on the investment basis?

A. Yes.

Mr. Mitchell: It has no relation to any other basis?

A. No, that is basis No. 4 that we are talking about.

Mr. Richards:

Q. Mr. Gifford, was this method of figuring depreciated value attacked before the Commission as improper?

[fol. 519] A. I don't believe that it was. I think maybe, Judge O'Brien, if you turn to page 51 you will find what is bothering you.

The Master: What is bothering me is this, that apparently you have added the depreciation of 10% and the scrap value, giving a total depreciation of $300?

A. Yes, but the——

The Master: Whereas, if the property was in actual 90% condition——

A. Well turn back to page 51 and you will see where I have used the total scrap value and the depreciated value, which then gives me a depreciated value including those two.

The Master: Then it gives that depreciated value of 10%?

A. It gives me a depreciated value of $1,467—on page 51—there will be a total depreciated value, including the scrap of $919,259—that is a total of the $87,686, which is the total scrap value, plus the total depreciated value of $831,573.

The Master: Then I am right, that on page 47 you have taken out the scrap value, and on page 51 you have put it back?

A. Put it back in again so as to show the scrap value, and so that I am figuring the depreciation value on the depreciable property. If I had not done this somebody would say "You have not figured the scrap and you have depreciated the scrap value," and of course I would have to admit that it might have been wrong. While the items of special track and track in the car barn and track drain, and various other items, all through the matter of tracks,—rock excavation, and so forth, have all been considered along the same line, and the unit prices applied thereto. That

brings us down to a summary on basis No. 4 as shown on page 41 of Exhibit J, depreciated value, $2,031,365.

The Master: That is on investment basis?

A. That is on investment basis. Then on reaching item [fol. 520] of overheads, and in determining overheads or establishing them for the purpose of this summary, I endeavored to follow the Wisconsin Commission method of adding 15% to the unit prices, which they generally use. Some of the unit prices I used did not conform to the unit prices that they used and I made the adjustment for them so that my overhead ranged from 10.25% in this case, on the investment basis, to 14% on some of the other bases, where the conditions would be—where the overheads included such items as engineering, supervision, organization, interest during construction, taxes and so forth. On that basis of investment I considered that this price for a total amount of the overhead as well as on the other basis would represent a fair amount for that item.

(Noon recess.)

Afternoon Session

(The examination of the witness Gifford was resumed as follows:)

The Master: Go back to page 47 and take the first item, reproduction of cost new, $1,614. Now you deduct 10% from that?

A. You deduct the scrap value first, $143.

Mr. Richards: That leaves $1,471?

A. Yes, $1,471.

The Master: Deduct $147.10?

A. Yes.

The Master: That leaves $1,323.90. You call that $1,324?

A. Well I didn't carry out the $80, I agreed to $80. It would be $1,324.90 and I make it $1,324.

The Master: Then on page 51?

A. Add scrap value $143.

The Master: Making $1,477, which would be the result, with scrap added?

A. Yes, that is the depreciated value of that piece of property with the scrap added.

[fol. 521] The Master: That makes the depreciation on that item by that method something less than 10%?

A. Yes. The wearing part is depreciated 10%. The scrap is always in at 100%; say that the depreciation on that item is slightly less than 10%.

The Master: That method follows through all of your work?

A. Yes. That method is considered in all of the valuations.

The Master: Is that the same method that you followed in obtaining depreciation, as to all items?

A. Yes.

The Master: And what was the average per cent that you found by that method?

A. For the entire property?

The Master: Yes.

A. 83.2%—you asked for per cent condition?

The Master: Yes. The Commission found 83 didn't it?

A. Yes, 83.

Mr. Carman: Yes. 83, that is what is in the order.

The Master: And Mr. Drum's was 86?

Mr. Richards: 86.02 I think Mr. Drum suggested was approximately right. I might add there, Mr. Gifford, do you know whether Mr. Drum pursued approximately the same method of figuring it out on the particular piece of property that you have?

The Witness: Well I would not want to speak for Mr. Drum, but my impression is that he did. I think where we differed as to depreciations (and this is only from memory, it has been so long I am not quite certain about it), we were getting a slightly less per cent condition on some of the depreciable parts than Mr. Drum found, and I think that was due to considering the life of the property and the age, more than Mr. Drum did. Now I am not certain that that is it. That is only my impression where the difference [fol. 522] lies.

Mr. Richards: You may go ahead with your statement, then.

The Master: Just a minute. Was this method computing the scrap value the same by both of them?

The Witness: I think so, wasn't it, Mr. Drum?

Mr. Drum: Yes.

The Witness: I think before recess I mentioned the items of overheads and details of that as shown in this exhibit and the ultimate answer was what was of importance, unless there are some questions along that line. The details are shown on pages 6, 7 and 8 of Exhibit I. I would say in that connection that in working this out and endeavoring to determine or to find an answer approximately in connection with the Wisconsin Commission's method of adding 15% of the direct costs, I have endeavored to work out what they would have added had they used our method, our unit prices on it, and that is shown on page 7 of Exhibit I. The method Mr. Drum used is somewhat different as he has explained, finding the total of costs, rather than the percentages, and that was a matter for the opinion of the Commission. I set up one method and in that respect it is possibly subject to criticism and yet I thought at the time that it was of sufficient amount to cover that item. The matter of materials and supplies and working funds are shown on page 9 of Exhibit I. It was found from the company's records that the cost of materials and supplies on hand as of December 31, 1920, assignable to the Duluth operation, amounted to $105,787.36. It was found from examination of the amounts of materials and supplies that the company did not have an extraordinary amount and we felt that for that reason that value should be adopted on the theory that the materials and supplies at cost would reflect the average amount that the company would need during 1920 to 1921, and on that we placed a valuation of $105,787.36. I think the Commis-
[fol. 523] sion used $105,000. During various months of the year the company had more material than at other times and we thought an average of $105,787.36 would be correct. As to working funds, the Street Railway property, the income revenue, is received by the company practically in advance of its giving service, and for that reason a working capital or a working fund in a street railway utility should be—a less amount is required than in an electric or a gas utility; in the operation of a street railway company we find that the company is accruing for expenses which it does not pay out immediately, such as

taxes, injuries, damages, and so forth. And yet there is a certain amount of cash required, and combined materials and supplies, and the working fund I considered about $130,000 or practically $25,000 for a working fund. I think the Commission allowed $135,000 for that item, compared to my $130,000.

Q. I will ask you there, do you consider that approximately $25,000, in addition to materials and supplies stated as $105,787.36 is a reasonably fair amount to be allowed to this corporation for its working fund or working capital?

A. Yes, I think it is. In addition to the other funds, that would be plenty for material and supplies in the working funds, provided the company was allowed to accumulate on the deferred expenses and have the use of that money during that time.

Q. Do you refer there to taxes? They may be paid twice a year—that they can accumulate for that along during the months?

A. Yes sir. In other words in every $100 that the company takes in they do not pay the total proportionate expense of that during the month, some of it will be deferred and paid out at later months so that that creates some balance and that balance which is automatically there, plus $25,000, I think is a sufficient amount.

[fol. 524] Q. And then you figure that the injuries and damages reserve will sometimes show a cash surplus so that they can use that for emergencies?

A. Under this theory it would show a cash surplus which should be built up to somewhat larger than that actual need, so that there would be some cash there that would be on hand.

The Master: What account is that?

A. Injuries and damages reserve.

The Master: Is that so included here?

A. Not here. I mention it on page 9 in considering the additional amount of actual cash. I mention that there would be some cash accrued, through taxes, injuries and damages reserve.

The Master: What is the difference between a reserve held to pay damages, and any other working capital?

A. Well, I don't think that there is any difference except that you have to have an additional amount other than

the cash that would be accrued through your injuries and damages reserve. I don't think that would be enough or that the amount carried for taxes would be enough. You have to have some cash in advance.

The Master: As I understand it, your theory is that approximately $25,000 as working capital would be sufficient, because in addition to that the company would be expected to have a little cash on hand which it was holding for a reserve to meet damage cases and taxes and other expenses.

A. That is not exactly it. The amount of money that the company would have on hand would be something in excess of $25,000 because of these accruals, and I believe that this company, if it had $25,000 and was allowed to accrue its tax and injuries and damages as is shown, that the company would have sufficient money in bank to operate safely [fol. 525] and properly. I simply mention the injuries and damages and taxes to show that I would not expect the company to have $25,000 in the bank all the time, but they might have more than that.

Mr. Richards:

Q. I am sure from what you say that you do not intend to increase the original estimate of $25,000 because of the taxes and injuries and damages reserve?

A. That is right, I would not increase it any.

Q. And I think you have stated that you think that $25,000 in addition to that amount of material and supplies would be reasonable and right and proper?

A. Yes sir, I stated that.

Mr. Carman: It is customary, is it not, for companies of this kind to have such a reserve fund for injuries and damages, aside from their working capital?

A. Yes sir.

Mr. Richards: You may proceed, Mr. Gifford, with your program.

The Master: Now, if we are going to another subject, maybe we would better exhaust this particular one. What reserves are carried by this company for damages?

Mr. Carmichael: My recollection is that Mr. Warren testified at one time, over a period of about seven years, as I recollect, the amount that they carried was within $114,000 in a period of seven years.

The Witness: Well that should be so, because he accrues that way. That is right, but that does not change it. On December 31 1921 there was a balance of $24,499.03 injuries and damages reserve. That is found in City's Exhibit A, page 12.

The Master: That has not been introduced in evidence yet.

The Witness: Oh. Well, it is on the index in the front.

The Master: No, but what they have reserved for taxes at that time.

The Witness: Well this is a condensed balance sheet and [fol. 526] I cannot tell you that. Would that be under current liabilities? I don't know as of this date, I cannot tell you from this exhibit.

The Master: The reserve of that amount for damages was a mere bookkeeping entry and the money was kept in the general account?

A. Oh yes.

The Master: And the reserve taxes would be the same?

A. That would be the same, yes.

The Master: Now, is it your judgment that for the current operations of the company aside from payment of taxes and damages, that $24,000 would be required as a cash balance to meet current expenses?

A. Yes. Except I want to say it in this way; let us assume that the company is starting operations with its business developed. If the company started out with $25,000 on that date, it would be able to get along very nicely with its stock of material and supplies, and it would start taking in that first day, its revenue, and as that revenue came in it would be coming in faster than the expenditures required, so that by the time the first pay roll was out it would have accumulated enough money for the pay roll and quite a fund besides, which would show a larger cash balance. If there had been any of the $25,000 expended during the first two weeks it could be reimbursed at that time, but I feel that, starting out with the property and the material and supplies, and if, in addition, the stockholders or the owners of the property put into the bank $20,000, they would be able to operate satisfactorily and efficiently.

Mr. Richards: Now have you made all the explanation that you desire to make on this item?

A. I think so.

Mr. Richards, (continuing): Continuing on page 10, Exhibit I, we take up the amount of per cent condition, or the condition of physical property of the company, and explain [fol. 527] how I arrived at that. I considered three factors, the conditions found by inspection, the life of the property, its use, its remaining life and the scrap value. In order to determine the per cent condition of the property with the amount of depreciation, a careful inspection is made of the property such as buildings, rolling stock, track and overhead distribution system and so forth. Such properties as could not be seen, for example such as ties, ballast, and so forth, were considered to be in the same condition that the visible portion of the track was at the time of inspection. The age and use of the property were also determined. This information, together with the experience had in other cases, led me to believe or to form an idea within reasonable limits of accuracy of the present condition. When the property was taken out of use; the scrap value would be less. This value we considered separately in the item of tangent track, in the item of rails, bolts, spikes, joint and tie rods, scrap value in other property, such as trolley, was not considered separately as it is considered that the property would be systematically maintained and that the scrap would always be in the property and would not depreciate. For example: the trolley is taken at 75 %. If it be in 100% condition when new, and 50% when taken out of use, an average of 75%. The condition as expressed in per cent herein is that which in my opinion reflects the present condition as regards wear, expectancy of life, scrap value and obsolescence, including the maintenance actually experienced which has come from operating expenses.

Q. I think I will ask you again: do you consider that you have given a fair and reasonable statement as to the fair expense of the depreciation and per cent condition of the property in your testimony?

A. I think I have.

Q. You have not underestimated it and have not over estimated it—I mean the percentage properly assigned to depreciation?

[fol. 528] A. I think that my percentage is a fair percentage and not over nor under estimated. The item of going value, shown on page 11 of Exhibit I, is assumed as a going value of $400,000. That is shown more in detail in Exhibit J in a table of Volume 1, Exhibit I. I have set out here approved facts for the use of the Railroad and Warehouse Commission and discussed these facts, first the development cost, the past earnings, the economical soundness of the property, the basis on which the physical property, the actual investment needed in the property. Those are five factors which I think should be considered in considering the going value, in one of which——

Q. Mr. Gifford, you don't understand, do you, that the City of Duluth in its presentation of its case before the Railroad and Warehouse Commission, ever consented to or intended to offer in evidence, as binding upon it, the going value stated therein, of $400,000, do you?

A. I think that the city did not agree to that specifically.

Mr. Carmichael: That was your opinion, however?

A. No, I didn't say that this was my opinion of the going value. I think I said, and I say now, that I endeavored to set up facts for the consideration of the Commission, that I had assumed $400,000 as that, and don't give it as the proper amount, or as my opinion, using 10% of the cost as a basis for that $400,000.

Q. Now you may make whatever statement you desire in reference to that if you have not previously stated.

A. Well under the item of developmental costs the company prepared a statement of those costs showing many of the costs which may be considered. Many of which have all ready, in my opinion, been paid for through past earn-[fol. 529] ings. I said, and I say now I can take no particular exception to the items mentioned in the statement. Those costs were probably all experienced, but that all of those costs existed as of value to date is probably doubtful. The earnings set aside for depreciation reserve should be considered in this connection. The matter of past earnings is considered here, I do not know that that is of much importance; past losses and past earnings should not be considered. However, I have placed those conditions here and I find that considering capital costs of 6¾% per annum

as the cost of capital, and considering 10% stock dividend on the bonds and stock outstanding, and certain requirements for depreciation fund, that the earnings have been, under those conditions, have shown an excess over the costs, and considering an 8% return and a depreciation charge of 2¾% it shows some deficit, the details of which are shown on pages 3 and 4 of the addenda to Exhibit I, and also on page 5. As to economic soundness of the property I think that this street railway is as economically sound as any utility of this kind for the following reasons: the topography, and arrangement of the city, long and narrow and hilly, all three of which are conducive to good street car travel. The records of the company show a riding per capita in 1920 of about 300 trips per year, which is higher than the average of cities of its size, and shows a good patronage. Second, the company has low power, and this is brought about by location near a cheap water power.

Q. Now I call your attention to the testimony there of Mr. Drum in which he said, as I recollect it, or show on the exhibits that there was an annual saving, I think, in 1921, of somewhat in excess of $80,000 a year, growing out of the fact of the use of the electric power as compared with the cost of steam power. Is this what you are referring to in this statement, low power cost?

[fol. 530] A. Well I am here referring to the fact that the company gets its power from a power company at a low cost. I suppose Mr. Drum's $81,000 is based upon a comparison of that figure with the steam power figure.

Q. I understand he was comparing that with the situation which exists in other companies that are compelled to use steam power development?

A. Well I imagine he was. That would be a comparison. If this company did not have this specific arrangement and had to make its power through a steam generating plant, it would not have the advantage of the cheap power rate. I do not mean that his $81,000 is correct. I have not checked those figures. But it is one of the reasons that makes me feel that this company is economically sound.

Q. Referring to your statement made upon the topography and arrangement of the city, I gather from your statement there that you do not consider that the topography of Duluth is a distinct disadvange to the operation of a street railway company and its net revenue?

A. No, I think it is an advantage. There is more travel because of the arrangement.

Q. How would you compare it in that respect to a city where a street railway starts in the center and radiates in different directions over a flat country, or comparatively flat?

A. Well, comparison—that is a pretty big order for a small question. It could be compared in this way: I think a city of the same size, located in a circle around a given point, might not have as much travel per capita as Duluth would have. On the other hand comparing its net revenue with a city which was flat and in a district around a center, the cost per car mile operated would probably be somewhat less. So, those things have to be considered, and it is pretty hard; but I would say, as far as going concern value [fol. 531] is concerned (and I think that the economical soundness of the company should be considered in that respect),—that the property built in the location such as Duluth has, it has a greater economical soundness, is of greater necessity to the community, and for that reason would have more going value than a company built around a center where competition might put it out of business easier than it would in Duluth.

Q. Do you consider that there is any possibility of any competition of any other street railway company putting this company out of business in the city of Duluth?

A. No sir, I don't think so. Don't they have the exclusive right, now that the indeterminate permit is in effect? That is my recollection.

Q. Do you think it could be fairly considered to have a monopoly of the street railway business of the city?

A. Well I don't know as to that. I think it has practically. That is, I don't think there will ever be any other street railway company come in and compete against it. As a legal point, I don't know.

Q. You can see practically no occasion for any other street railway endeavoring to come in and compete with this street railway company?

A. I cannot see it.

Mr. Carmichael: You were talking about jitney competition the other day.

Q. I am talking about some other street railway now.

A. Another item is the combining of these two ideas, that is, the arrangement of the city and the low power costs, together with efficient management, have made an economically sound utility. That is my conclusion as to that.

Mr. Carmichael: That conclusion still remains, does it not?

A. Yes sir.

[fol. 532] Q. In other words you feel there is a place here for this plant, and that it has a reasonably permanent prospect of staying so—a necessity existing, that will continue in the future?

A. I do not want to prophesy too far in the future, as to the future of street railways, but I think that this street railway as such economically is sounder than the street railway in a lot of other communities, and I would say that I would expect this street railway with its low power cost, and the arrangement of the city to withstand competition of any kind longer than any other street railroad not as favorably located. I think that another factor which should be considered in the going value, is the basis used for the valuation of the physical property, on the theory that if you used a higher valuation of physical property, the amount of going value that would be added should be less. Or if you use a low valuation of physical property, low unit prices, your going concern value should be more. That is again a matter of judgment and discussion to bring out that point. The actual investment needed in the property is another thing that should be considered in the going value. It should be given consideration in determining the going value. If a large investment is needed to carry on a certain service, the thing is not as sound as one with a lesser investment. The same thing may be said about the investment as was said about the unit prices used in the valuation of the physical property. I don't think there is any rule or formula that I can give for working out going value. The various factors are discussed here. If you consider any one and only one of the factors you might arrive at a warped, or unreasonable going value. I think you must consider all the factors pertaining to the situation, and then base it as a matter of judgment.

Q. Now you have devoted considerable attention, have [fol. 533] you not to the situation of the Superior division, as well as the Duluth division of this system?

A. Well, I am more or less familiar with the Superior division, yes, sir.

Q. And the matter of a going value has been passed upon for the Superior division, by the Supreme Court of the state of Wisconsin?

A. I think going value——

Mr. Carmichael: Please answer Yes or no, whether it has been or not.

The Witness: Did he say established by the Supreme Court?

Mr. Carmichael: He said, passed upon.

The Witness: I think I could say Yes to that.

Mr. Richards, continuing:

Q. That was in the decision, 161 Wis., filed in 1916?

A. Well, I am not sure of the citation, but I think that is correct.

Q. 161 Wis., Duluth Street Railway against the City of Superior, the exact page I have not in mind. If on a foundation of $700,000, what is your recollection of the going concern value that they found?

Mr. Carmichael: Objected to as being irrelevant and immaterial.

Mr. Mitchell: It would be purely hearsay, and there is no possible materiality here. The decision is available, and of course can be used by either side for argument, for what it is worth.

Mr. Richards: I concede that, but I was just asking this witness. Well, all right, I will waive that question, or withdraw it. Is it a fact that the matter of determining a going concern value depends upon the particular facts of a particular case, and—Well, you may answer that.

A. Yes, sir.

Q. And that there is no formula connected with determining what it shall be?

A. In my opinion, there is no formula.

Q. Have you ever known of any decision of any supreme court of any state of the United States, or any federal court that laid down a formula?

A. No, sir.

[fol. 534] Q. Is it not a fact that it is said to be a matter of independent judgment in a particular case, to determine what it is, or if any exists?

A. Well, I don't know that just exactly those words were said, but that is about my opinion of what those passages mean in that respect.

Q. You have made a study of the opinions of courts and commissions along this line, of going concern value, have you?

A. Yes.

Q. Have you in mind a statement of Commissioner Prouty of the Interstate Commerce Commission, to the effect that there is no way to bolster up and back up an opinion on that proposition, but you hit out in the air, and take and determine it, and not find it, so far as that particular transaction is concerned, or in substance to that effect?

A. Well, it seems to me I have *h*read such a statement or heard it; I didn't hear him make it.

Mr. Carmichael: I suggest, if you are going to ask——

Mr. Richards: Well, all right. He has answered. You can put in your objection.

Q. Well, are there many engineers, so far as you know in your experience as an engineer, and having made a study of these rate-making questions and valuations and going concern value, is there such a thing as any rule to establish —a general rule to establish going concern value?

A. I don't know of any.

Q. You never heard of any?

A. Well, I have heard rules advanced by different people, but nothing that would fit all cases, no general rule that would stand up under all conditions.

Q. Bearing in mind what you know, I would ask you if the claim of the City, in your judgment, would be unreasonable, that a going concern value as high as $200,000 placed upon the Duluth Street Railway Company, would be unreasonable?

Mr. Carmichael: Objected to, no basis in the evidence; no testimony supporting any such conclusion.

The Master: Of course, the form of the question might be criticised if you want to make that objection; but I sup-
[fol. 535] pose that Mr. Richard has a right to ask the opinion of his witness as to what would be the lowest or the highest valuation in his judgment.

Mr. Carmichael: There is no foundation for any such question.

The Master: It has the same effect as asking whether he considers $200,000 to be unreasonable. That may be open to the objection of being leading, but that is the only objection.

Q. I will change that. Do you think, bearing in mind your knowledge of all existing circumstances connected with the Duluth Street Railway Company, that the claim of the City that an amount allowed for going concern value should not exceed $200,000. is an unreasonable claim?

A. I will have to qualify my answer. I cannot answer that Yes or No. I will have to qualify it by saying that $200,000 going value would not be unreasonably low, provided the other factors going in to make up that valuation were considered therewith. But I do think that if you had used too low a figure in the costs, and had used too low a value in other things, the $200,000 would then be considered unreasonably low.

The Master: Wouldn't it be better to use the proper unit costs than to put in a high going value?

The Witness: Yes.

The Master: That is, wouldn't it be better to use proper unit costs, and then correct your error in the amount of going value allowed?

The Witness: I think that is true.

Mr. Richards: In this case have you used any improper unit costs in figuring out the elements?

[fol. 536] A. I have not used improper unit costs, no. In my opinion, going value is not like a pole or a street car, or power house, or car barn. It is not something you can set out definitely,—"There it is,—going value, so much." You can't do that. It must be considered in connection with all the other things. I would like to answer that question definitely, but I cannot do it, without considering these

things; this may be of value, and it may not; but it seems that eventually the going value item will be one that will be restricted entirely to the cost of developing the business from the time the property is ready to operate, up to the time that it is a going, operating concern.

Q. From the time it is ready to operate?

A. Yes.

Q. Up to the time that it becomes a going concern?

A. That is it, exactly. In our physical valuation of the property, it seems to me the proper method—if you are going to follow it strictly—would be to establish what it is worth as a physical entity, and then, to that must be considered a reasonable amount to allow that company, to start from that point and develop its business; and when the business is developed, that is the stopping point of your going value.

Q. Now, it is entirely conjectural, isn't it, in regard to what that would be? That amount, after you got ready to do business, up to the time that it becomes a going concern,—as to what amount of money would represent that value?

A. Yes, sir.

Q. Entirely conjectural?

A. I think it is.

Q. Now, it appears that the Commission did allow a going concern value of $500,000?

A. Yes, sir.

Q. I will ask you this question: Do you not consider that in so fixing that figure, it certainly acted very liberally with the street-car company?

Mr. Mitchell: The question is quite leading, isn't it?

[fol. 537] Mr. Richards: Well, maybe it is.

Mr. Carmichael: I have no objection to your asking his opinion as to what going concern value should be put on this property.

The Master: The objection, and exception, will be noted.

The Witness: I think a going concern value of $500,000 for the Duluth street railway, could be considered very liberal.

Mr. Richards:

Q. Now, you may continue, Mr. Gifford, in your presentation as you have it in mind.

A. On page 12 of Exhibit I is discussed the cost of financing. The Company's engineers included in the valuation an item of cost of financing. From a study of the organization, legal, and other expenses used in the general overhead, I find the cost of financing is to be the discount on the sale of securities. In order to have our reports compare, it is necessary, then, for me to put in an item of this nature. Whether the Commission gives any value, in a rate case, to this item, is for them to decide. It is a report that I made for the Railway and Warehouse Commission.

Q. It is the same report?

A. It is the same report. The actual cost of financing, as I find from the Company's records, is, bond discount, sale of securities, $100,525. This is the discount on all Company bonds issued after the reorganization in 1900. Of this account the total issue of $3,732,000, 72%, or $2,689,474, was assignable to the Duluth division. So that 72% of the total discount would be chargeable to the Duluth division, which is $72,443. There is, in the reorganization, an item of $23,100 for commission on the sale of the reorganization bonds. This is really a reorganization expense. It also has to do with securities, and I am including 72% of that item, as chargeable to the Duluth division, making $89,075 as the total cost of financing from the records of the company, and that would apply to the Basis No. 1, and Basis No. 4. Now, the Basis No. 3, which was a present-day value, I have said that I was unable to figure [fol. 538] the discount on the sale of securities, because I did not know what rate of interest the securities would yield, and the discount would depend entirely upon the rate of interest. But I have assumed in that case the cost of financing, 3.34% of the total cost, or $249,030; and on Basis No. 2, which is a ten-year average, I have assumed the cost of the same percentage, 3.34 per cent on the lesser value, or a total of $185,504.

Q. In the statement on this page 13, where you say, if the Company were financed today,—that refers to the date of July 1, 1921?

A. Yes.

Q. And this is a statement that you made for the Railway and Warehouse Commission, at that time?

A. Yes, sir. The entire Exhibit I and Exhibit J were made for that hearing before the Railroad Commission.

By the Master: Where is that cost of financing?

A. It is not in the summaries at all. I claim that the cost of financing should be considered in the rate of return, and did not put it in the totals, in these figures.

Q. You have not included that in the value of the property?

A. No. I just mentioned the facts as I found them, on the cost of financing.

Mr. Richards:

Q. The cost of financing is found on pages 37 and 38 of the printed Bill with Order attached,—the Commission's order. Continue, Mr. Gifford.

A. I think that covers, in a general way, all the exhibits I and J. There is, of course, other information in there, but my description of it covers it in a general way.

Q. That discusses the physical property there, material and supplies, working capital, financing, and going concern value?

A. And cost of financing.

Mr. Richards: Cost of financing. We will offer, then, in evidence, these City's exhibits I and J, as explanatory of the testimony of the witness, and qualified thereby.

[fol. 539] The Master: Is there any objection?

Mr. Carmichael: No objection, but in not objection, we do not wish to subscribe to all therein contained.

The Master: I would like to ask Mr. Gifford, have you examined Complainant's exhibits 1 and 2, I think they are?

A. Those are Mr. Drum's?

The Master: Mr. Drum's tables, in which he assumes to set out your figures, your amounts, and his amounts?

A. Yes, I have.

The Master: Well, are those correct, as a statement of amounts arrived at by you, or assumed by you?

Mr. Mitchell: Exhibit 32 is the one that you refer to.

The Witness: I will have to take that.

The Master: I wish you would look at it.

A. The exhibit 32, which compares Mr. Drum's valuation and mine, sets up the figures—I think it includes in

the cost, or in the value,—This exhibit 32 purports to show that I have included cost of financing as part of the value, and that I have included $400,000 developmental costs, which I have not done; but as a basis of comparison, in setting up the two tables with these two points mentioned, I think a proper comparison may be drawn.

The Master: I understand that these tables contain land values on which you have not agreed?

A. Yes.

The Master: And that it contains items of physical property other than land, upon which you have agreed as to that item?

A. That is right.

The Master: And plaintiff presented a table here assuming to give those amounts as agreed?

A. That is Exhibit 32.

The Master: And it is Exhibit 1, also?

A. Exhibit 1 is a part of it.

[fol. 540] The Master: Exhibit 1 and Exhibit 2?

A. Exhibit 1 is Drum's.

The Master: I understand that you have disagreed as to the amount, and disagreed as to the overhead, intangibles, as to going value, and matters of cost of financing. I simply want to know——

A. Yes.

The Master: —whether that statement that the other items upon which you had agreed were correctly stated,—agreed to by you?

A. Yes, sir, that is correct.

The Master: Simply for my own convenience.

A. Let us reverse it. There is a difference in the per cent condition, in the land, in the overheads, in the so-called going value, and in the cost of financing and working capital.

The Master: But the items as given here, as to which agreement has been reached, are correctly stated, in both your exhibits, and Mr. Drum's Exhibits?

A. I think so, yes, sir.

Mr. Richards:

Q. I will call the attention of the Court to page 5 of plaintiff's (City's) Exhibit I, page 5 of the table, a table showing excess and deficit each year on the average value, not de-

preciated, considering an eight per cent return and a depreciation charge of 2.75 per cent, and I will ask the witness if there was any intention of assuming that eight per cent was a fair rate of return, or anything here intimating an opinion on the question of what would be a proper rate of return, or whether any such—was there any such intention in making up this table?

A. This table was not made with any intention of assuming or asserting that eight per cent return, or 2.75% was proper for depreciation; but it was put in to show what the excess or deficit would be on that basis, the same as the total on the preceding page 4 of the table Exhibit I, which was based upon 6.75% for return, and 1.679% for depreciation. Page 4 is based upon cost of capital and the actual depreciation, [fol. 541] and on page 5 substituted for that other values to give the Commission an idea of the property.

Q. You may proceed, Mr. Gifford.

A. That is all about those two exhibits. There is another exhibit I testified to in the case before the Commission. In City's Exhibit A, pages 10 and 11, will be found a recapitulation inclusive of the valuation, based upon prices in effect January 1, 1922. This valuation is made by a comparative method, with the valuation based upon prices in effect in July, 1921. The same method has been followed, except as to unit prices, and the difference in unit prices is shown on page 11. It will be noted in the first column there were prices in effect as of 1915, and then prices in 1921, and the per cent which 1922 is of 1915, giving a corrected 1922 price in percentage; and then the per cent conditions applied to these figures that were applied in the other four bases. The prices in January, 1922, show a rather considerable drop from the prices in effect in July, 1921, a short period of six months, and this valuation is based upon January, 1922 figures. which happen to be considerable lower than July of 1921.

Q. By how much, in the total result?

A. Well, value based upon prices of 1921, at the present time, $6,763,797, and on this basis $5,751,932, a difference of approximately a million dollars—$957,000, I think it is. It should be said in this connection that at this time there was quite a dip in commodity prices affecting street

railway construction, and some of the prices have since gone back beyond this point to actually as of January, 1922. I think that reflects a very fair reproduction value as of that time.

By the Master:

Q. Have you used the same condition per cent as was used in Exhibit I?

A. Yes.

The Master: And have these figures been submitted to Mr. Drum?

A. They were in the original figures; we had them at that time.

Mr. Richards: This evidence was introduced on January 30, 1922,—about that date, I think.

[fol. 542] The Master: Oh, yes. This exhibit is not in evidence?

Mr. Richards: No. We intend to offer it.

Redirect examination.

By Mr. Carmichael:

Q. Your first column in 1915 you had as pre-war, and 100% on page 11.

A. I use 1915 as 100 per cent.

Q. And the second column is as of July 1, 1921, I think?

A. Yes, sir. The per cent that 1921 is of 1915.

Q. So that your 1921 price is 84.28% higher than 1915 prices, on the total value of the property?

A. Including overheads, yes, sir.

Q. And the column under 1922 was made as of January 30, 1922?

A. Yes.

Q. And there you procure the total per cent, including your overheads of 56.5% more than the 1915 or pre-war prices?

A. Yes, sir.

Q. You have not brought that down to July, 1922, or the present time, have you?

A. No, sir.

Mr. Richards: I may as well offer this exhibit and have it in. The City offers City's Exhibit A, comprising the indexes and pages 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

Mr. Carmichael: We would object to it for the purpose of preserving the record, on the ground that it is incompetent, irrelevant and immaterial, and certain parts of it have no bearing on this case, and are not admissible under the pleadings.

The Master: Exhibit A, City's exhibit, consisting of 19 pages, received, subject to the objection.

Mr. Carmichael: Before offering the rest, 11 to 19, may we see it please? We have nothing from page 11 on.

(Short recess.)

The Master: Exhibit A, consisting of 19 pages, is offered in evidence, and received subject to objection.

Mr. Carmichael: The same objection made to the eleven, [fol. 543] may be considered as made to the whole nineteen, and exception noted.

The Witness: Referring to page 3, City's Exhibit "A," this is a tabulation of the net additions and betterments made by the Company in the years 1900 to 1920, both inclusive, reported by the Company to the City in its annual reports, and which was Exhibit C in an emergency case before the Commission, prepared by me. Since that time, certain adjustments have been made to these figures, and, in a general way, by following the adjusted figures, but they are not exact. However, it was an exhibit in that case, and in a general way shows the way in which the property was built up, and the amount of money spent on the property by the company each year from 1900 to 1920. Page 4 is copy of an exhibit prepared by me and placed before the Commission.

Q. Oh, I will ask you, referring to City's Exhibit A which you have just spoken of, page 3: Is that a true statement from the Company's books, of the years and figures and amounts, purporting to appear on this page 3, formerly before the Commission?

A. It is a true statement of the costs and betterments; but in that case we have made certain adjustments to this, so that this is not a correct or adjusted copy or tabulation of the exact figures, but in a general way it follows.

Q. Would you want to make any additions to that, for the years 1921 or 1922?

A. I think those additions are all in the record, I have it before me. To bring this down to date, those additions would have to be made.

Q. Now, referring to page 4 of City's Exhibit A.

A. That is a copy of an exhibit that I placed in evidence at the emergency hearing, or in the emergency case, which was taken from the annual reports made by the Company to the City, which shows the dividends that they paid, and the per cent those dividends were upon the stock assignable to the Duluth division.

Q. That is, since 1909 that stock would amount to $1,200,000?

[fol. 544] A. Well, I think that is correct. I would have to refresh my memory on it.

Q. Or was it changed from three hundred thousand to two hundred thousand (1,200,000) later?

A. Yes, since 1909, that has been $1,200,000.

Q. And is this, to the best of your knowledge and belief a true statement of actual dividends paid in those years, as shown by an examination of the original records and books of the Company?

A. Yes, sir.

Q. Amounting in total to $1,342,146.46?

A. Yes, sir.

Q. And starting—considering these years from 1909 to 1920 inclusive, the stock dividends would average 11.18 per cent? Is that correct?

A. Well, it so states here, but it seems to me that in copying there must have been a mistake, because it is 111.8 per cent for twelve years, so that would not be 11.18—it is something less than that.

Examined by Mr. Mitchell:

Q. That percent of stock in the right hand column is the percent upon which—upon the stock of the operating company, as assigned by you to the Duluth division, $1,200,000 of stock?

A. Well, it is the stock of Duluth Street Railway Company, the operating company. It is not assigned by me; but that is what—this would show on the company's trial balance. It is assigned by the Company.

Q. To the Duluth division?

A. To the Duluth division.

Q. Now, if you apply that to the stock of the holding company in the hands of the public, you get an entirely different percentage?

A. I think so. I do not remember the stock of the holding company in the hands of the public, but it is more than $1,200,000, so you would get a different answer.

Q. You have heard the evidence that it is $1,500,000 of four per cent preferred, and $3,100,000 of common stock.

Mr. Richards: Objected to as irrelevant and immaterial.

A. I did not hear that testimony.

[fol. 545] Mr. Richards: I will ask a question to correct that.

Mr. Richards:

Q. You divide this total by twelve, and isn't it a fact that you would get 9.31? I think that is correct?

A. 9.31, yes.

Q. 9.31 would be the average per year instead of the figure stated on this exhibit of 11.18?

A. Yes.

Q. As shown by the company's books, then, the owners of the stock of this company to the extent of $1,200,000 shares receives this total stated, and that means on that stock the average during that period of twelve years, of 9.31 per cent dividends?

A. It does.

Q. All right. Proceed.

A. Page 5 of City's Exhibit A is a statement prepared by me to present to the Commission in the emergency hearing. It is taken from the annual reports of the company made to the City, showing the amount available, or the revenues available for dividends from the year 1900 to 1920, the first three and one-half months of 1900 to 1920, the end of 1920; that is derived by determining the revenue as reported, subtracting or deducting therefrom the operating expenses and depreciation as shown, and the net amount then transferred to this column for the amount available,

and that represents a certain percentage of the stock outstanding which is shown in the third column.

The Master: Then that is the amount available for dividends and interest?

A. Yes, sir.

Mr. Richards:

Q. The total is $2,890,473.31?

A. I may have to correct myself. Well, that is after interest.

Q. And that is a true statement, is it, Mr. Gifford?

A. To the best of my knowledge, it is.

Q. Taken from the original records of the company for each year?

A. Yes, taken from the signed report made by the company to the City. The reports we had before we got from the Company's books, made for the emergency hearing.

Q. They were in evidence before the Commission?

A. In the emergency case.

[fol. 546] Q. And that evidence was incorporated before them in their hearing? It was the basis of the order given here and attacked in this suit?

A. That would be my idea of it, yes.

Q. All right.

A. Page 6, City's Exhibit A is a copy of an exhibit prepared and placed before the Commission in the emergency rate case, which was taken from the Company's reports to the City, and shows the gross income, exclusive of depreciation, of the Duluth division; the amount available for depreciation and return, by years, for three and one-half months of 1900 to the end of 1920. That, I think, is a true and correct copy of the records from which it was taken.

Q. That is, the company's records, the books of the company?

A. The report of the Company to the City,—a signed statement.

Q. Can you add to this the similar amount available for this purpose for the year 1921, so that we can complete it down to 1922, readily? If so, please do so.

A. I will have to furnish that, because the depreciation item I do not have before me. I can furnish that informa-

tion. It is in the record. It can be obtained, but I do not happen to have it right before me now.

Q. I see. Then I will refer back to this page 5 and I will ask you if you have, or can now, bring that down to include the years 1921 and 1922.

A. I cannot do it right now. I can, by looking up the record. It is in this case, already.

Q. Well, bear that in mind, please, Mr. Gifford, and I will try to have that done, to bring it down to date. Proceed.

A. Page 7 of City's Exhibit A is a statement prepared from the company's statement filed with the city, which was an exhibit prepared for the emergency case before the Commission, and which shows the amount of depreciation accrued by years, of the Duluth division of the Duluth Street Railway Company.

Mr. Carmichael: Prepared by you, was it not?

[fol. 547] A. Yes, sir. I meant to say this was prepared by me as were all of these exhibits that I have given from this volume.

Mr. Richards:

Q. And this shows a total including 1920, of $1,144,743.06?

A. Yes, sir.

Q. And is that a true report of those reports furnished by the Company to the City, to the best of your knowledge and belief?

A. Yes, sir, it is. I might add that in 1921 the amount accrued was $134,303.81.

Q. And for 1922?

A. It was $135,742.59. That, I obtained from Mr. Warren's testimony here, and put it down in my notes.

The Master: The tabulation on page 7 does not include property which has become obsolete?

A. This is the amount that has been accrued by years.

The Master: Yes, but is it a statement of depreciation charged against property that is still in existence and contained in your inventory, or does it include property some of which had disappeared and is not included in this inventory?

A. The amount set up as accrued by years started in 1905, so any material or property which has been abandoned since 1905 would not be in my valuation, and this accrual would have been set up to replace some of that abandoned property.

Q. You do not know how much of that there was?

A. No, I do not, because I don't know what physical property existed in 1906, etc.

The Master: This tabulation could not be taken to be a correct statement of the amount of depreciation charged by the company against property which is now included in the inventory plaintiff's exhibit 2?

A. No, it could not.

Mr. Mitchell: And against this list has been charged, or out of this has been taken all the property that has been treated as replacements and renewals and charged into depreciation reserve?

[fol. 548] A. Yes. From that balance or from the amount accrued up to 1920, this $1,144,743.06, and the amount accrued in 1921 of $134,303.81, being a total of $1,279,046.87, there is now a balance, or was as of December 31, 1921, a balance of $972,806.38, so that the difference in round figures of $300,000 has been taken out of depreciation, and put into additional property?

The Master: That does not yet answer what I am trying to get at.

The Witness: Oh, I was answering Mr. Mitchell's question, I thought.

The Master: You present here an inventory of property now in existence?

The Witness: Yes.

The Master: And the depreciation of the property has been estimated by you at 16.8 per cent, and by Mr. Drum at 13-and-a-fraction per cent. Now, I want to know how those figures compare with the depreciation charged by the Company against that same property, and that is not given.

A. The two do not tie at all. The depreciation that I found on the valuation—that Mr. Drum found—was his opinion of accrued depreciation which actually existed in the physical property now in existence. This is simply a record showing how much the Company has accrued

hrough operating expenses, to date, so I do not believe could tie the two together for you at all.

By Mr. Richards:

Q. You say, and I say, Mr. Gifford, that this record hows, taking into consideration 1921, that the company's ecords showing the balance in depreciation reserve fund f $972,606.67—that the difference between those two mounts is practically $300,000, and shows that that has een put into additional property? Or did you make that tatement?

A. I think I made that statement. I might correct my-[fol. 549] self, probably, and say, "put into additional prop-rty." It may have gone somewhere else—I don't know.

Q. If it had been put into additional property, and new roperty put into the inventory, wouldn't that be a case of uplicate charge against the property?

A. Well, I think I mistated that. It would not be a uplication, it simply is that the amount that they have harged against that depreciation for actual abandonments as been $300,000, and if they have put that into additional roperty, I think I misstated myself. I don't know whether hey did, or not.

Q. You did not say they did, but I indicated that. As I nderstand it—Well, we won't bother with that. You are ot sure that it shows that difference?

A. No, and I would not know whether that additional roperty was in the present inventory, or not. I have no way of telling.

Q. Well, if it is not indicated in any way, and it is not in the present property, where is it likely to have gone?

A. Some of it may be in the present property some of it may have gone into property which has been abandoned since then; I don't know where else it could have gone.

Q. Or dividends?

A. I don't think it went for dividends, because the Company apparently had sufficient earnings outside of depreciation to pay the dividends that were actually paid.

Q. Outside of depreciation?

A. Outside of depreciation.

Q. All right.

A. Page 8 of the City's Exhibit A is a copy of an exhibit that I prepared for the Railway Commission in the emergency hearing, which shows the revenue passengers, car miles, and the revenue passengers per car miles, for the Duluth division of the Duluth Street Railway Company, from 1911 to 1920, with 1921 estimated.

Mr. Carmichael: The actual figure is 27,246,916, Mr. Gifford.

A. Well, the significance of this exhibit is a guide to the character of service given by the Company. It is not a complete guide, but it is of interest in determining the company's costs, and revenue, because the less number of revenue passengers per car mile, obviously the greater [fol. 550] amount per car mile each passenger has to pay. That is all of City's Exhibit A. At the hearing before the Commission I prepared and submitted a report called Rate Study of the Duluth Street Railway Company, prepared and submitted in January 1922.

(Exhibit marked City's Exhibit "K.")

The Witness: Exhibit K here, was Exhibit M before the Commission.

Mr. Richards: City's Exhibit K is offered in evidence.

Mr. Carmichael: Same objection as to Exhibit A.

The Master: Received, subject to the objection and exception.

The Witness: Exhibit K consists of 21 pages, curves, etc., which was Exhibit M in the original hearing before the Commission. It is rather elementary, and discusses among other things the making of street railway rates after the value has been determined; the factors of interest or of importance, to be determined before a rate can be made, and after a valuation has been made; the rate of return; proper amount of depreciation, and other operating expenses; and then the total cost having been found, the probable patronage would be the unit at which to divide the cost, to arrive at the average fare. As to the rate of return, I have found that the actual cost of borrowing money by the Company, and sale of its bonds, considering the discount that the Company suffered on the bonds, when they were issued (referring to pages 2, 3 and 4), I have found that the money they borrowed cost them 5.18 per

cent per annum for the bonds, which includes the bon- discount. And assuming that there will be an 8% cash dividend on the stock, and assuming the amount of stock, namely, $1,200,000, and the amount of bonds outstanding, $2,516,890, there would be a total amount of return required, to pay that bond interest and amortization of discount, and 8% on the stock, a total of $226,374.90, or 6.1% [fol. 551] as an average. If the 10% dividend were paid on the stock, the return would be $6.75%. On page 4 is set up the table showing when the bonds were issued, and the price that they were sold for, and the discount, and the numbers of the bonds. That is a guide to the cost of the capital, on the capitalization of the Company as it is now financed. In pages 5, 6, 7 and 8 and 9 I have discussed the item of depreciation, with a view to determine the amount that should be set up annually in depreciation accrual. The table on page 6 shows the reproduction value and the depreciated value, and the amount of depreciation actually experienced according to the valuation that I prepared. I determined the average of the property, and from that the average amount in dollars that the depreciation has amounted to per year, on the property now in place. This gives, within reasonable limits, at least, the actual depreciation experienced by the Company during the life of the present property. This shows $63,508 as the amount actually lost per year in the property that is now in place.

Q. What is that contrasted with, in the company's present account for 1922?

A. That cannot be contrasted exactly with the amount in any statement for 1922. They set up for depreciation in 1922 $135,742.59. However, out of that $135,742.59, there would be some abandonments charged against it, or some renewals and replacements charged against it. That is, the $63,058 is the average depreciation of the property, considering the way the property has been maintained, so that the company is expecting $135,742.59 for that, and if they don't expend a lot of money in maintenance, as they should, they will need that. In other words, the item of depreciation and the item of maintenance must be considered together; and I feel that a proper amount set up as depreciation accrual is necessary, and cannot be put back into the property through maintenance. If the property is maintained, there will be very little depreciation. If not main-

tained, there will be more depreciation. The property, as [fol. 552] is shown, has been so maintained that there has been only $63,058 depreciation.

Q. Actual?

A. Actual. Now, then, in setting up the amount of depreciation theoretically, $63,058 would be sufficient, but with the understanding that the same maintenance policy would be maintained in the future that has been maintained in the past. And from a study of the actual depreciation, and the average life of the property, I find that the average age is 10.03 years, for the per cent condition in depreciable property of 83.2. This shows a life of approximately 30 years, considering that when a piece of property is one-half gone or used up, that piece will be abandoned and replaced. Non-depreciable property, of course, is not considered, as it does not depreciate. Some property appreciates, but I have not considered the appreciation under these conditions. On that basis, then, it resolves itself into my theory of depreciation, of setting up say, $63,000, or possibly a little more than $68,000 as a depreciation reserve, and then spending the balance for maintenance. In the year 1920 the Company spent approximately $170,000 for maintenance. Mr. Warren testified to that in the emergency hearing, is where I got that figure. The prices for labor and material in 1920 were considerably higher than an average for the past ten years, and I believe higher than will be in effect the next ten years. (It is understood that this exhibit was prepared and presented in January 1922.) An inspection of the property shows some deferred maintenance, for example, special track. Ordinarily, this property, special track, is in 75% condition, 50% when abandoned, and 100% when new. But to this should be added the scrap value, which is 10% of the original cost, making a per cent condition of 85%. I found that special track work was in about 68% condition, exclusive of scrap, and on an average shows seven per cent below normal. There are other instances of needed maintenance, although in a general way the property has been well maintained. Considering these conditions, and also that the average normal maintenance for a period of years will be [fol. 553] at prices lower than in effect in 1920, I have placed the proper maintenance expenditures for 1922 at—for the twelve months ended December 31, 1922, $240,000,

nd the average for the next five years at $200,000. If the Company expends an average of $200,000 for the next five years and $240,000 next year, the property will be put in excellent working condition. This expenditure, plus the depreciation accrual considered herein, will allow the Company a proper annual upkeep and accrue a proper amount to make up the loss in the cost of property due to depreciation not made up through maintenance. I believe this depreciation accrual should be set up in a fund to be used for replacement of property only. It should not be used for extensions. It should be kept in good securities, those with good markets, or certificates of deposit, which would guarantee them to be quick assets. If this fund were used for extensions, it would be the same as paying it out in dividends, and re-investing the company's property. I believe. I believe this depreciation fund should be used only for the purpose for which it is collected, namely, maintenance, or upkeep of the property which has earned it. Any other use of it is misappropriation of funds, and leads to disaster if followed. If the Company spends $200,000 per year in maintenance and sets aside $68,000 in a fund for accruing the invested value, it would, in 30 years, have spent $6,000,000 in upkeep, and would have accrued $3,000,000 in the fund. In fifteen years, the *maintainence* would be $3,000,000, and the fund would amount to $3,160,000, a total well over the original value. It is seen, then, that the depreciation accrual and the maintenance figures I have used will replace the property in thirteen years, which may mean that they are too high; but they are really conservative, and will not be destructive if followed; and if strictly followed, they will insure a good railway and good service, at the lowest possible rate. The Company should be required to set aside at least $300,000 next year for maintenance and [fol. 554] depreciation, and $68,000 of this amount should be set aside in a fund to be used for depreciation only. This amount, $68,000, is proper for 1922, and should be increased as the investment increases later on. The Company's policy has differed from this method, some, in that it has been setting up a depreciation reserve larger than I think is proper for that reserve, and it has on the other hand spent less for maintenance than I would expect it to spend. The difference in actual results is as follows: The Gifford method: Maintenance, $240,000; depreciation, $68,-

000; makes a total of $308,000. Company's method: Maintenance, $174,000; depreciation, $135,000; makes a total of $309,000. The net result for the coming year is, therefore, about the same. The only difference is the method. The Company's method allows it to slight its maintenance and put this maintenance money, or money that should go into this maintenance, into extensions. In my opinion, that is wrong. That is, in a general way, my idea of depreciation reserve, as compared to maintenance,—is what I call the proper amount of maintenance and depreciation. On page 10 Of Exhibit K I discuss the operatings expenses as an estimate for the year 1922. At the time this was made up, the exact schedule which the Company would operate under was somewhat indefinite. A change was being discussed, so it was necessary, in order to intelligently estimate what those expenses would be, it was necessary to divide the expense between the fixed and variable expense—operating under various schedules. If a greater service were required by the City of Duluth, a larger cost of operating would be created in the company's expenses, so, in order to make an intelligent estimate between fixed and variable costs, the fixed cost itself that would remain constant, no matter how many cars were run, and the variable expense, being the expense which would vary with the number of cars and the schedule to be adopted. So I prepared an estimate, on page 11, and that was based on the totals in the last column, based upon 3,280,000 car miles.

Q. That total shows what?

A. $1,142,523.

Q. The Company's claim was what, as shown by the next page?

[fol. 555] A. Page 12 of Exhibit K shows a condensed statement of operating expenses for the year ending November 30, 1921, as per the Company's books. In order to test the accuracy of this estimate of operating expenses, it would be necessary to adjust the number of car miles actually operated, which will be seen later, and the reason for it; and the expenses for the year (on page 13), the actual expenses for the year ending November 30, 1921, and the effect that the reduction in labor in January, 1922 would have upon it, the reduction being $5,134;

Q. I don't know that there is any particular relevancy in the matter on this page.

A. No, I don't know that there is. Mr. Warren and I made an estimate on different bases for the Commission, and they checked it very closely.

Q. Just at present, I cannot see any particular relevancy in pages 13, 14 and 15 and 16, but that may be a hasty conclusion. If we can eliminate anything I will be glad to do it.

A. There is one thing here that ought to go in, this exhibit showing revenue passengers——

Q. Does that exhibit have any relation to pages 10, 11, 12 and 13, 14, 15, and 16?

A. None at all.

Q. We will consider that sufficient at this time in so far as further reference is made to this Exhibit K, except what the witness desires to state, if anything, in regard to this graph.

A. That graph is a graph of the revenue passengers carried, showing how it is increased and decreased, the effect of strikes and certain competition, and other items. This is the graph following page 16.

Q. It is a graph following pages 16 of this exhibit K, between 16 and 18, which would probably be numbered 17.

A. It shows that the riding in 1911 was at the rate of 229.1 passengers per capita; in 1920 it was 298 passengers per capita. It shows the effect of the wartime on Duluth; the effect of the strike, jitney competition, and so forth, and where the revenue passengers are now standing. It gives an idea of the relative riding by years, and a picture of that [fol. 556] condition. That is all.

Q. Brought down to include 1923, so far as that year is gone?

A. Yes, brought down to August 1, 1923.

Mr. Richards: At the present time I think we will reserve the question of anything further on these blueprints, will be introduced, and take it up later. Exhibit B is offered in evidence.

Mr. Carmichael: Same objection as to the previous one.

The Master: Received subject to the objection.

Mr. Carmichael: Exception.

The Master: Exhibit B is offered and received in evidence, subject to the objection and exception.

At this point an adjournment was taken until the following morning, August 24th, at 9:30 *p.* m.

[fol. 557] Duluth, Minnesota,
August 24, 1923—9:30 a. m.

Pursuant to the adjournment, the parties met and the hearing was resumed as follows:

Byron T. Gifford resumed the stand for further examination.

By Mr. Richards:

Q. The matter of the operating expenses of the company for the year 1922 was before the Railway and Warehouse Commission in its hearing prior to its order made on July 13, 1922?

A. Yes, sir.

Mr. Carmichael: Do you mean the matter of operating expense, or the matter of the estimate of operating expense?

The Witness: I do not know what you mean. It was considered by the Commission,—the operating expenses.

Q. That hearing was closed on February 1, 1922?

A. Yes, I think that is correct.

Q. And on the question of the rate of return, it seemed to be material to determine what the probable revenue of the company would be for 1922, net?

A. Yes.

Q. And that involved the question of what its probable fair operating expense for that year would be?

A. Yes, sir.

Q. And as a basis for consideration, the operating expenses and revenues in the immediately preceding years were considered?

A. Yes, sir.

Q. And it was an effort on the part of the City to have a clear understanding as to what the probable normal, fair operating expense of the company would be for 1922?

A. Yes. I think I can answer that Yes.

Q. And the efforts of the City—yourself being the witness—in that examination of the previous history of the company from the past books, financial records and existing conditions—was to reach a conclusion on that point?

A. Yes.

Q. As to what was fair operating expense, normal, and what would fairly be the fair net return for the year 1922?

A. Yes.

[fol. 558] *be the fair net return for the year 1922?*

A. Yes.

Q. For instance, the Company made a claim of the amount of depreciation required?

A. Yes, sir.

Q. And that was discussed?

A. Yes.

Q. In full. And the expenses for snow and ice, for instance, growing out of the past history of the company, was considered?

A. Yes, sir.

Q. And after the hearing was closed, then the case was opened at the request of the Street Railway Company to take into account the extraordinary snowstorm which occurred on or about Washington's birthday, February 22nd, do you remember that?

A. Well, I was not——

Q. And evidence was introduced in regard to the probable expense?

A. Well, I remember that the cost of that snowstorm was considered, but I don't know whether the case was reopened at the request of the company or not.

Q. Do you remember the company claimed it probably cost them $25,000?

A. I don't remember that figure, Mr. Richards.

Q. And that it interrupted their traffic, and they were not in operation for a day or two, or several days?

A. I remember that, yes.

Q. And that the pressure of the work was such that it destroyed a number of the armatures of their different snowplows in gettings things done and cleaned up?

A. I remember that was discussed.

Q. And so the matter of the effect of that snowstorm upon the condition of the company and its operating ex-

pense was also taken into consideration, and was a basis of argument before the Commission, orally and in the briefs?

A. I think so, yes, sir.

Q. I will ask you now, as a matter of recollection, whether as you recollect it, the record, as it appears in our present exhibits, shows the expenses of the company for clearing snow and ice off of their tracks in 1921?

A. I cannot recollect that the item was set out separately in our present exhibits,—that is, the exhibits that I have put in in this case.

[fol. 559] The Master: Mr. Richards, won't you refer to the exhibit by number?

Mr. Richards: I was just asking for his recollection. I don't know, myself, whether it was offered, or not.

The Master: In what exhibit was operating expenses set out?

The Witness: On page 19 of City's Exhibit A, removal of snow and ice 1921-20-19-18, is shown.

Q. Is it your recollection that the Commission made adjustments of the respective claims of the parties, the Street Railway Company and the City covering all the items that should go into the question of operating expenses?

Mr. Carmichael: May I inquire if you mean the order that has been introduced in evidence?

Mr. Richards: Yes. The order that has been introduced in evidence, of July 13, 1922.

Mr. Carmichael: It seems to me this is peculiar examination, to ask this witness repeatedly as to what effect the Commission gave to certain things. We have the Commission's order, and I think we can all of us determine from that what they did.

A. I think that the Commission did.

Q. Is it a fact that a considerable time was taken up by a detailed study of the actual operating expenses, in that case?

Mr. Carmichael: By the Commission? How does he know?

Q. No. In taking testimony?

A. Yes, considerable time was taken up in the hearing and taking of testimony on the operating expenses of the company.

The Master: I understand from the statement of Mr. Mitchell, that it is conceded by plaintiff in this case that this matter was duly before the Commission, and the Commission gave due hearing to the parties, and that they considered all the evidence introduced, and finally made their order which must be given the full effect of an order made [fol. 560] upon due hearing, and therefore presumptively correct.

Mr. Mitchell: That is a lot broader than I intended to state. We make no question as to the jurisdiction of the Commission.

The Master: Then I think that it is proper to show that if the Commission proceeded upon due hearing and upon due evidence, its order is presumed to be correct, it is prima facie correct until proven incorrect.

Mr. Mitchell: I make no point that there was a due hearing, and that evidence was introduced, and was received by the Commission, from both sides. How much consideration they gave to that evidence, I do not know, and we do not want to be deemed as admitting that. But we were not denied any opportunity to introduce evidence. We introduced all the evidence we desired to introduce; but just how much consideration they gave to our evidence, we do not know. But we make no point that they did not have full jurisdiction of the matter.

(Papers marked respectively City's Exhibits L and M.)

Mr. Richards:

Q. I show you City's Exhibit L, and ask you to state what that is, in the main.

A. This is a memorandum prepared by Mr. McWethy and myself, at the request of Mr. Richards and Mr. Carman, to compare, as best we could, the facts and conditions in the Galveston Electric case, decision of the U. S. Supreme Court, and the Southwestern Bell Telephone decision of the U. S. Supreme Court, and the decision of the Circuit Court of Appeals in the Minneapolis gas case, to compare the

facts and conditions of these decisions with the facts and conditions of the Duluth Street Railway Company's property.

Q. Was that as compared with the Commission's valuation?

A. Yes, as compared with the valuation determined by the Minnesota Railway and Warehouse Commission.

Q. On the various facts?

A. Yes.

[fol. 561] Q. So far as the facts and figures are concerned, are you able to state that it is a true representation, a true comparison, to the best of your ability, of the facts?

A. Yes, sir.

Q. And the matters involved, as applied to the various elements considered in the question of the valuation in those cases?

A. Yes, sir.

Mr. Richards: We offer this Exhibit L in evidence as an aid to the Court, an additional statement of the facts here in evidence, in the case of the Duluth Street Railway Company, and shown in the Commission's order of July 13, 1922, and as compared with the conditions before the courts in these respective cases, and as illustrative of the evidence of the witnesses in these cases.

Mr. Carmichael: May I ask a question or two before the Master rules? This is an interpretation which you and Mr. McWethy made of these decisions, Mr. Gifford?

A. Yes, sir.

Mr. Carmichael:

Q. Did you and Mr. McWethy spend some time with Mr. Esterly, attempting to agree upon the meaning of those decisions and interpretation of them applied to this property here?

Mr. Richards: Objected to as immaterial. It does not make any difference, it is a waste of time.

The Master: Objection noted.

A. We did.

Q. And you were unable to agree upon any bases?

Mr. Richards: Same objection.

The Master: Taken subject to the objection, and exception.

A. Well, I would not say that.

Q. Well, you did not agree at any rate?

A. We agreed to disagree on certain conditions, but it does not follow that we disagreed on every point.

Q. But you were unable to agree,—Mr. Esterly would not [fol. 562] agree to the conclusions that you set down in your report just offered in evidence?

Mr. Richards: Well, isn't that best shown by Mr. Esterly himself, if he wishes to criticise?

Mr. Carman: I add the further objection that it is not shown that Mr. Esterly has any qualifications. He has not been on the stand.

The Master: Well, of course, to a great extent, Mr. Carman, that is true, but haven't we been, all through this, showing a situation where the engineers agreed, and where they disagreed?

Mr. Carman: Yes. But Mr. Esterly is not qualified in the record, yet, as an engineer.

The Master: Well, note the objections.

A. I think that is true, yes.

Mr. Carmichael: Now, this exhibit is objected to as an attempt made by engineers to interpret these decisions, and being clearly not the proper place for all these things; the brief is the proper place for this, and not the evidence.

The Master: Objections noted.

Examined by Mr. Richards:

Q. Now, it strikes me that it will aid this Court at this time to have this read, Exhibit L. Explain the first page, Mr. Gifford.

A. The first page following the title page, headed The Galveston Railway case, Mr. McWethy and I, in studying the decisions, endeavored to determine the facts of the conditions approved by the Supreme Court in that decision. The method—And let it be understood, that when I say the method, or anything else, that it is our opinion of the method. The method followed by the lower court in that

case, and which was approved by the Supreme Court, determined the historical cost and added 33-1/3% to the property installed prior to 1915; added nothing to the property installed after 1915, and value as of the present day. It increases the amount of depreciation by one-third, and the answer found was, in the Galveston case, $1,626,061. [fol. 563] The actual value approved was $1,625,000. Following out that same method for the Duluth Street Railway Company, the historical cost on an investment basis, as agreed upon by the engineers, which was also the case in the Galveston decision, was, in the case of Duluth, $3,487,020, and adding 14% over, which was the percentage determined by the Railway and Warehouse Commission in this case,—adding the land, material and supplies, working capital, as found by the Railway and Warehouse Commission, makes a total of $4,269,803. We find that, as shown on this Exhibit, page 2, there was certain property installed after 1915, which, if considered at present-day value (which method is followed by the Galveston decision—And on page 2 the property which is not subject to appreciation is set out in the top table, on page 2. Turning to page 2, the table on the top of the page, shows the property in Duluth that would not be subject to appreciation, if the Galveston basis or method was followed. That is the method in the Galveston case: Land, material and supplies, working capital, and the additions in 1916 and 1921. The Galveston decision split that at 1915. But in the year 1915 the Duluth Street Railway abandoned more property than it added to its plant, and for that reason that credit "additions and betterments" we did not consider, because it did not give the true amount of additions to the company. And by taking a credit on that, we thought it would penalize the company, which we thought would be unfair. So we have split it at 1916, instead of 1915. We find that the additions for 1916, 1917, 1918, 1919, 1920, the first six months of 1921, including the land and other items mentioned, are $938,-216.21. Deducting that amount from the value of $4,269,803, gives us a balance of $3,331,587, which is the amount of property subject to appreciation. Now, increasing that value one-third, we find——

Q. As was done in the Galveston case?

A. Yes. We find that is $4,442,116. And adding the property unappreciated, we find the total of $5,380,332.

[fol. 564] Then deducting the accrued depreciation as found (and that detail is found on page 2) on which there is depreciation, consists of the following. Property subject to appreciation is shown on line 8 page 1, $3,331,587; and the additions and betterments as shown in the table at the top of page 2 of this exhibit, which total $663,216. Adding those together, we find $3,994,803, which is the amount of property subject to depreciation. The Commission determined an 83% condition, which shows 17% depreciation; 17% on $3,994,803, is $679,116.21, and we used $679,117, to make it even. That figure is shown on page 1, line 11, under the Duluth Value. Then, increasing the accrued depreciation one-third, as was done in the Galveston case, we find the accrued depreciation to be $905,489. The value then found at this basis would be $4,474,843. Additions, July 1, 1921 to December 31, 1921, $6,978. Power contract, $91,300. Net value found by the Commission for the power contract. Adding this to the value found above, we find $4,573,121. The value found by the Commission was $4,599,978, or a difference of $26,857 which the Commission's decision was greater than the value found by following the basis of the Galveston decision.

Q. The direct inference there would be that the Commission certainly treated them fairly, at least,—the Commission of Minnesota?

A. That would be the inference I would draw. I suppose that would be the inference, yes, sir.

Mr. Carman: Before you pass from that, to identify this case you speak of, it was the Galveston Electric Company against the City of Galveston, reported in 258 U. S. Reports, 388?

A. I think that is the correct citation, decided April 10, 1922.

Mr. Carman: State where you got the figures of the Galveston case, in comparison with the valuation of the Duluth Street Railway Company's.

A. Well, it is in the decision; as I remember the figures are set out in Note No. 4 in that decision.

Mr. Carman: And you have already stated that you have [fol. 565] also made a study of the decision, itself?

A. Yes, sir.

Mr. Mitchell: I want to ask one question, to make this sure. In reaching this result, you have increased the depreciation which the Railway and Warehouse Commission found in this case to $905,489, from $679,117?

A. Yes.

Mr. Mitchell: And if you had, in this comparison, stuck to the depreciation as found by the Railway and Warehouse Commission in this state, then this $26,857 would be increased by the difference between—what?

A. $226,372.

Mr. Mitchell, continuing:

Q. That is, if you, in making that comparison, had stuck by the decision of the Commission of Minnesota as to the amount of accrued depreciation?

A. Well, I did stick to that amount.

Q. No, you increased it by $226,372.

A. Well, I had to follow the Galveston decision,—basis.

Q. But I say, if you had not increased it, then you would have reached the result of what?

A. $253,229.

Q. That is, if you had given the same effect, in your analysis, that the Court did in the Galveston case, to the present-day prices, and had not increased the depreciation above that amount found by the Commission in this state, then you would have found, under the Galveston method, an increased amount of $253,229?

A. Why, I don't think you are stating that correctly, Mr. Mitchell, because that is not what the Court did. If I had not increased the depreciation one-third, I would not have followed the method stated in that decision. That is, that is my interpretation of it. If I hadn't done that, then the figure would have been $253,229.

The Master: Is depreciation always one-third?

A. No, but the depreciation was in that case increased one-third.

The Master: Under the testimony in this case, that depreciation 8.32, and Dr. Drum's 86 plus,—where is the basis of anything outside of those figures, either up or down?

[fol. 566] A. Well, the Commission ordered 83%.

The Master: Yes, and that is your testimony now on the stand, isn't it?

A. Well, in this case I adopted what the Commission——

The Master: I understand that, but depreciation is always a question of fact, isn't it?

A. Oh, yes.

Q. And there is nothing to show that one case is not the same as the other?

A. No.

The Master: So that the comparison, outside of the proper method of procedure, or the proper effect to be given to principles of valuation, could not be made between any two cases, could it?

A. It seems to me that the same method can be followed in two cases.

The Master: You mean to apply the facts of one case to another?

A. Not necessarily. But if you apply the same methods to the facts of different cases, you will arrive at a true comparison.

The Master: Well, the amount of depreciation is not a method?

A. The amount of depreciation is not a method, but increasing it one-third, it seems to me is a method.

Mr. Carmichael: Mr. Gifford, in your analysis on page 1 of the Galveston decision, you have not taken into account at all the $500,000 going value as found by the Commission in this state relative to this property?

A. No, sir.

The Master: Was the going value allowed in the Galveston case?

A. It was not allowed there.

Mr. Carman: Which was due to a lack of proof, and so stated in that decision.

Mr. Richards: Isn't it a fact,—isn't the effect of Mr. Mitchell's question this: That if you did not follow the method of the Galveston case, you would arrive at a different result here?

A. I think that is it, yes.

Mr. Richards: That is the real essence of it.

[fol. 567] Mr. Richards, continuing:

Q. Will you proceed to explain the comparison made on the Southwestern Bell Telephone Company case?

A. In the Southwestern Bell Telephone case, the Supreme Court increased the value as found by the Missouri Commission, from $20,400,000 to $25,000,000, an increase of 22.4%. The facts on which the Commission had reached this value, as I read from the decision, were on prices prevailing in the years 1913, 1914 and 1916. Now the prices prevailing in 1913, 1914 and 1916 in the Duluth case, would compare very closely to the prices in effect in 1915, as used in Basis No. 1, the 1915 price valuation——

Q. In the pending case?

A. Yes, sir. That was $3,488,161. That compared very closely with the Basis No. 4, which was $3,487,000. This is so near that it makes very little difference which one is used. We have used the investment basis as shown on page 2 of the Minnesota Commission's decision in this case, adding to that 14% for overheads, as shown on page 6 of the Commission's decision, and increasing that 22.4%, adding land, material and supplies, and working capital, as found by the Minnesota Commission, is $5,164,639. Deducting the accrued depreciation as of December 21, as found by the Company's trial balance of that date, $972,806, we find depreciated value of $4,191,833. Adding ten per cent for intangibles, as was done by the Missouri Commission, we find $4,611,833. Adding power contract, and the additions from July, 1921 to December, 1921, $6,978, giving the valuation found by this method of $4,710,011. Comparing with the valuation found by the Minnesota Commission in this case, it is $110,033 less than would be found by following the method I just outlined.

Mr. Carman: Mr. Gifford, this decision with which you have made comparison with the Minnesota Commission's valuation in this case, and to which you have referred in City's Exhibit L, as the Southwestern Bell Telephone case, is the case decided May 21, 1923, and reported in 42 [fol. 568] Supreme Court Reporter, page 544?

A. Yes, sir, I think that is the correct citation.

Mr. Carman: Did you make a study of that decision, and of the figures contained in that decision, and the evi-

dence notes in making this comparison with the Minnesota Commission's valuation?

A. Yes, sir.

Mr. Richards: And to the best of your knowledge and belief, it is a true statement of the facts used as a basis of comparison?

A. I would so consider it, yes sir.

Mr. Mitchell: May I ask two or three questions on that, Mr. Gifford? When you here show the total valuations, including tangibles and intangibles, found by the Commission here,—$20,400,000.

A. Yes, sir.

Mr. Mitchell: That was increased to give effect, to give some recognition to present-day prices—to $25,000,000?

A. Yes, sir.

Mr. Mitchell: Or an increase of the entire value, tangibles and intangibles, of 22.4%?

A. Yes.

Q. The Commission in this case allowed on the tangibles only, or on the physical property, an increase to reflect present-day prices of 13%, or just a fraction of 13%?

Mr. Richards: By this case, you mean the present case, pending?

Mr. Mitchell: The Duluth Street Railway Company case.

A. I have not figured that out. I do not know that figure.

Mr. Mitchell: You have not figured that out?

A. No. I don't know how you arrive at that 13%.

Mr. Mitchell, I continuing:

Q. I thought the figures I was asking were agreed upon, so I will not discuss that further. In this case, the Duluth case, the Commission found accrued depreciation of 17%?

A. Yes, sir.

Q. Applying that to the value as you found it here in the Southwestern Bell case, you would find 17% of the $4,889,649, would you not, as depreciation?

[fol. 569] A. Yes, but I would not be following the method set out in that case there, deducting depreciation reserve——

Q. Well, Mr. Gifford——

A. Oh, I understand. You mean, eliminating that portion of this thing and substituting therefor 17%——

Q. Yes. I am asking this question: The Commission in this Duluth case found accrued depreciation of 17% of the value?

A. Yes, sir.

Q. So that if you give the effect that you do in your analysis to the Southwestern Bell case, and use the Commission's rate of 17%, you would have the depreciation; 17% of $4,889,639. Will you tell us what that would be?

A. Approximately $831,000.

Q. That allows depreciation on the overheads, $507,783?

A. Yes.

Q. Well, did the Commission depreciate all of those overheads?

A. I think so.

Q. All right. Then you get—the 17% is how much?

A. $831,238.63.

Q. But you have, in reaching that result, used $972,806?

A. Yes, sir.

Q. And the difference between those is $141,567.37?

A. $141,567.37, yes.

Q. So that if you used as your depreciation to deduct here only 17%, of the value, excluding land, material, supplies, and working capital, instead of $972,806, you would have had the figure $831,238?

A. Yes, sir.

Q. And that would have increased this difference by $141,567.37?

A. Well, you mean the difference of one hundred ten thousand——

Q. You would have increased that by $141,567.37?

A. It would have increased it by $141,567.37, plus ten per cent on that amount, because of the intangibles in there.

Q. I am going to ask you another question on the intangibles. But you have here used as an item of depreciation, $141,567.37 more than 17% of the cost as you find it by this method?

A. Yes, sir.

Q. And you have also departed from the Commission's [fol. 570] finding as to the value of the value of the intangibles.

A. Well, I followed that Missouri Commission.

Q. I understand you did. But you did not follow the Minnesota Commission as to the value of the intangibles?

A. No, because I was applying the Missouri values to the Minnesota values.

Q. I understand that, but I want the Master to understand what you are doing.

A. I thought you were asking me what I did. I am very sorry.

Q. Now then, the Commission in this case has found intangibles in this particular property of $550,000.

A. No.

Q. Well, by intangibles you mean the going concern value?

A. I suppose so, yes.

Q. Then you have changed that from $500,000 that this Commission found, to $420,000?

A. Well, this Commission established $500,000 as going concern value. The Missouri Commission added ten per cent for what they call intangibles. Now, if the ten per cent intangibles of the Missouri Commission can be considered to be going value, then you can compare the two that way. They did not say it that way. If you substitute the going value found by the Minnesota Commission, for the 10% intangibles found by the Missouri Commission, then you would increase it $80,000.

Q. All right. Then, if you stand by the decision of the Minnesota Commission as to going concer- value, and as to the depreciation, you would add $221,567 to this difference which you find here?

A. Well, I cannot answer that Yes, because of the broadness of the question.

Q. All right. That is all.

Examined by Mr. Carman:

Q. And if you did that, there would not be any comparison at all, would there?

A. No.

Q. In other words, the cross-examination you have had simply amounts to this: That if you followed the Missouri Commission's method every place it was favorable to the [fol. 571] Duluth Street Railway, and followed the Minnesota Commission's every place it was favorable to the

Duluth Street Railway, you would work out a different result, as has been shown here on the cross-examination, but it would not be any comparison of the method between the two valuations. Isn't that about the size of it?

A. Well, I don't know that they have picked out every point advantageous to them.

Q. Well, they have picked out two of them.

A. The po-nts they did pick out, it would be picking out two advantageous points, and not considering the others. I think you have to consider the decision as a whole, to be fair.

Examined by Mr. Mitchell:

Q. If you give effect to the percentage and present-day prices which the Supreme Court said must be given in that case, and done, without attempting to devise the findings of this Commission as to the amount of accrued depreciation, or as to the going concern value, then you would increase it by at least the amount I have suggested?

A. I think not, Mr. Mitchell, as I understand the question, because if you give effect to certain elements of the Minnesota decision, and then, as you say, give effect to the present day prices in the going value, in the overheads, in the things that were established by the Minnesota Commission,—I don't know what effect they did give to present day prices, so you cannot say that you take their $500,000 for going value, and $550,000 for overheads, and 83% condition, and say how much effect that gave to present-day prices. I don't know.

Q. But do you understand, to give effect to present day prices, necessarily means that you have got to decrease going concern value found by the Minnesota Commission?

A. Well, I think you can give effect to present day prices—I don't take present-day prices, though, necessarily——

Q. Anything to do with going concern value?

A. No. I don't think present day prices should affect [fol. 572] the physical property; and then you would not have the same going concern value as you would if you did not add to the present day prices.

Q. I think the two are inter-related.

Q. It seems to me that that conclusion is reached.

A. It is the same that I said yesterday.

The Master: If you use smaller unit prices, you increase going value. If you use larger unit prices, you reduce the going value.

Examined by Mr. Carman:

Q. It is a fact that in this tabulation or comparison here with the Southwestern Bell Telephone case your best judgment is, if you found the going value of the Duluth valuation by the method used in the Southwestern Bell Telephone case, it would be $420,000, and not $500,000?

A. As I understand, the ten per cent intangibles, yes.

Q. Now, on this accrued depreciation, this item, $972,-806, about which there has been question here, I ask you if it is not a fact that those figures were within 38 cents of the actual depreciation reserve of the Duluth Street Railway Company as found and set forth in the Minnesota Commission's order, all in this case?

A. I think that is correct.

The Master: I do not understand that, Mr. Carman.

Mr. Carman: The Commission's order finds that the actual depreciation reserve, the balance of the actual depreciation reserve of the Duluth Street Railway was $972,-806.38, on January 1, 1921. By coincidence, this method figures out—it is within thirty-eight cents of that amount.

The Master: By adopting the method in the Telephone case, you come to that?

Mr. Carman: No. I say that it happens that by coincidence, even by that method adopted, which has been attacked here, each amount, none the less, would be within thirty-eight cents of the same figure.

A. Well, it ought to, because that figure is taken from that decision, but that is the depreciation reserve of the [fol. 573] Duluth Street Railway Company property.

Mr. Mitchell: You merely took the book reserve?

A. Yes, as stated by the Company.

Mr. Mitchell: And you didn't put down the 38¢?

A. No, I left off the cents.

Mr. Mitchell: Well, that is a coincidence.

Mr. Richards: Please explain that comparison if you can.

A. The Southwestern Bell case,—the Commission deducted the accrued depreciation reserve.

Mr. Mitchell: They merely took the book depreciation, instead of taking the fact.

A. Yes. So I did the same thing, as found in the Commission's decision.

Examined by Mr. Carman:

Q. Mr. Gifford, before we take up the next part of these exhibits,—Ehhibit L, I will ask you to go back to the Galveston case, line 12, on the first page of the Galveston case, comparison, City's Exhibit L, reading, "Accrued depreciation increase one-third", with the figures set out. I think you should state whether or not the method used in the Galveston case was to increase the accrued depreciation one-third irrespective of whether that depreciation might have been 17%, or any other per cent?

A. I think that is correct. The decision shows that the accrued depreciation was increased one-third, so that would naturally follow.

Mr. Richards: Now, will you take up page 4 of this Exhibit L?

A. Page 4 and Page 5, comparison of the principles in t*me* Minneapolis Gas case, applied to the conditions in Duluth, divided into two parts, A and B. In part A the principles approved by the Court, first an increase of pre-war costs of 50%; straight line depreciation was approved. [fol. 574] The elimination of the item of cost of financing, present-day value of land, general overhead expense, was established at $371,896, which is equal to 4.75% of the base value. Working capital allowed was $567,871, which is equal to 7.3% of the base value. Going value of $500,000 was allowed, which is equal to 6.4% of base value, with return of 7½% on the value established by the application of the above principles. Applying those principles to the books in Duluth, first, we have assumed the pre-war cost to be on the basis of 1915 prices. From page 2 of the Commission's decision, that would be the prices agreed upon by Mr. Drum and myself,—$3,488,161. Increasing this item 50%, we find a total of $5,232,241.50. The depreciation approved was on a straight line basis, and if you will look at the note on page 5, at the bottom of the page, it was a matter of testimony before the Commission that the average life of the Duluth Street Railway was 30 years; the

average age, considering scrap value, was 10.03 years; on this basis, straight line depreciation would be one-third, and present condition would be 66-2/3%, leaving $3,488,-161,—which is 66⅔% of $5,232,241.50. Cost of financing is eliminated, and if you added for the present-day value of land $140,000,—it gives the sum total of $3,628,161. Adding general overheads, working capital, and going value, at the percentages mentioned, 18.45% for these three items; this is $699,395.70. Adding that to the base value, we find $4,327,556.70. Adding the additions from July 1, 1921 to December 31, 1921, of $6,978.22, is a total value of $4,334,-534.92. Adding value of the power contract, gives a total of $4,425,834.92. The Commission's value is $4,599,978,—or a difference of $174,143.08.

Mr. Richards: That is, that difference is that the Commission in this case, following that method, allowed $174,-143.08 more than would have been the figure following the method of the gas case?

A. Yes, and that is brought about by the use of the straight-line depreciation, and the lower percentages added for overheads and going value than the Minnesota Com-[fol. 575] mission considered. It also adds a larger per cent in working capital, because the Minneapolis case being a gas case, required, I imagine, a larger working capital, but they did use the same percentage of working capital in the Duluth analysis as they did in the Minneapolis gas case.

Mr. Richards: I will ask you if, in making this statement here, you have carefully and accurately followed, to the best of your knowledge and belief, and truly here stated, the percentages and amounts?

A. I have, yes, sir.

Mr. Carman: In referring to this Minneapolis Gaslight case, that is the case of the City of Minneapolis against Rand, decided January 8, 1923, and reported in 285 Federal Reporter, page 823?

A. Yes, sir.

The Master: The computations which you have made with reference to the Minneapolis Gas case were made according to the formula set out on the first sheet of that case, under "A"?

A. Yes, sir.

The Master: Using that formula, you have made those computations?

A. That is right.

Examined by Mr. Mitchell:

Q. Mr. Gifford, in the result you reach here, you used accrued depreciation, 33-1/3%, instead of 17%, which the Commission in the Duluth case used, didn't you?

A. Yes, sir.

Q. That would make a difference in those figures of 16-1/3% of the $5,132,000?

A. Yes, sir.

Q. So that if the accrued depreciation is to be treated as a fact, and depending upon the condition of the property, rather than upon some formula, and if you follow the decision of the Commission as to the rate of accrued depreciation, applying the increase as you have here, you would change the depreciation from 1/3, as you have here, to 17%?

[fol. 576] A. Yes, sir.

Q. You had also used in this case different amounts for intangibles, going value and your working capital, that is, you have not used the figures found by the Minnesota Commission as to these amounts?

A. No, because I have paid no attention to what the Minnesota Commission found in amount, except as a total. I have taken the facts which were established and applied them to the formula used by the Circuit Court of Appeals to determine what value the Minesota Commission would have found, had they used those, and comparing it to the totals they did find.

Q. You have entirely omitted any allowance for materials and supplies?

A. Well, working capital, material and supplies were figured together.

Q. You took them together?

A. Yes.

Examined by Mr. Carman:

Q. In other words here, as in the other two comparisons you have followed the methods all the way through, instead of part way?

A. I have tried to follow the complete method all the way through.

Q. And if you did any other way, it would not be a comparison?

A. Not as to amount, no.

By Mr. Mitchell:

Q. Do you think, to follow the method, it is necessary to change the finding of the Commission as to the amount of depreciation?

A. Yes. I think that you have to follow the method of the Minneapolis Gas case, the decision, that you cannot use as a fact the depreciation as determined by the Minnesota Commission.

Q. You think, then, that evidence as to the present condition of the Duluth Street Railway really has not bearing if, as a matter of fact, the Minneapolis Gas Company has depreciated one-third?

A. Well, the difference in depreciation is that the Minne- [fol. 577] apolis Gas decision approved a straight line bases of depreciation, while the depreciation handled by the Commission was not a straight line depreciation. If you use straight line instead of the other, you get a different answer, of course.

Mr. Richards: I next offer in evidence City's Exhibit M, which is a certified copy of the opinion handed down by the Railroad Commission of Wisconsin, in its decision of May 28, 1923, in the Matter of the Application of the Duluth Street Railway Company for a re-valuation of the street railway properties in the city of Superior, for an order revising and prescribing a reasonable and adequate rate of fare in the said city of Superior, certified by the Secretary as being a true, compared copy of the decision and order, with the original decision and order of the Railway Commission of Wisconsin now on file in the office of said commission required by law to be in the custody of said Secretary.

Mr. Mitchell: Objected to as immaterial, no evidence before this court as to what the evidence was before the Commission, and nothing more than hearsay as to the conclusions of the Commission upon evidence and facts and circumstances before it of which we have no knowledge.

Mr. Richards: As an answer to that, I will ask this witness if—it is already in the evidence to some extent, and it may be somewhat repetition——

Mr. Mitchell: I am assuming that the Court will allow it and note the objection.

(Objection and exception noted.)

Mr. Richards: Yes, that is right. I will precede it, however, by this question: That came up in what year? You were a witness in that case, Mr. Gifford?

A. Yes, sir.

[fol. 578] By Mr. Richards:

Q. And in that matter you represented the City of Superior as its engineer?

A. Yes, sir.

Q. Who represented the Street Railway Company as its engineer in the matter of the valuation?

A. Mr. A. L. Drum.

Q. What method was pursued in that case, in regard to valuation? Was it agreed as to the inventory, or not?

A. Mr. Drum made an inventory and the valuation. I had copies of it, and checked the inventory and agreed to it, and checked Mr. Drum's unit prices, and agreed to those.

Q. So that the method, so far as an agreed inventory and agreed unit prices, was the same as was here done before the Minnesota Railroad and Warehouse Commission here, up to this date in court here?

A. Practically so, yes—in the Duluth Street Railway case.

Q. In what respect were the differences of opinion between you and Mr. Drum in that case?

Mr. Carmichael: Objected to as incompetent, irrelevant and immaterial.

The Master: Note the objection, and exception.

A. I don't know that I can answer that fully. We agreed as to unit prices. Neither one of us testified as to the land.

Q. How was the land disposed of? It was testified to by other people. The same as in this case?

A. Yes, I think the same.

Q. By Mr. Scott in this case, and Mr. Cheadle, and the Realtors Board of Duluth making valuations of the land. Was there the same proceeding adopted in the case of the Superior Division?

A. There were some real estate men in the Superior case. I don't know their names, whether it was a real estate Board, or not, but there were other people, I have forgotten who.

Q. There were differences on overheads?

A. Yes, there were differences on overheads. I did not prepare a complete valuation such as we did in the Duluth case, for the Superior case. I only checked Mr. Drum's [fol. 579] and agreed with him down as far as the unit prices would take us, and from there on we disagreed. But I did not prepare exactly the same form of report in that case as I did in this. Generally speaking, the same class of evidence was before the Wisconsin Commission, as was before this one.

Q. Now, in dealing with the matter of materials and supplies, was Mr. Warren a witness in the case?

A. Mr. Warren was a witness. I don't remember about the evidence on materials and supplies. It was discussed, but I do not know whether he discussed it, or not.

Q. The books of the Company were presented, relating to the affairs of the whole system?

A. Exhibits were prepared for the Superior Division and the Duluth division, and the total of the two, and were submitted at that hearing.

Q. And was there an apportionment made as the proper portion to be assigned to the Duluth division and to the Superior division on question of material and supplies?

A. I don't know that there was a percentage established there. I can not remember definitely about that. There was a division of materials and supplies between Duluth and Superior, but just what the detail of it was, I cannot remember.

Q. And there had to be legitimately an apportionment throughout, didn't there, as between the Superior division and the Duluth division?

Mr. Carmichael: All testimony on this line is objected to as incompetent, irrelevant and immaterial, and some part of it as hearsay.

The Master: Objection noted.

Mr. Carmichael: And exception.

A. There was, yes, an apportionment made throughout the case between the two divisions.

Q. The question of power contract came up for discus- [fol. 580] sion, and the claim was made by the Street Railway Company as to the value of the power contract as apportioned to the Superior division?

A. Yes, sir.

Q. Is it a fact that the Superior division gets its power from the same place that the Duluth division gets it?

A. Yes, sir, the same company.

Q. The same company. And is it a fact that, to the best of your recollection, the same arguments were presented by the Street Railway Company as to the Superior division on the basis of what the relations of the power contract was—Mr. Drum's statement, for instance, as to——

A. You said arguments. Do you mean testimony?

Q. Testimony.

A. I think the same—generally the same testimony was presented, as to the other.

Q. Did Mr. Drum put in a statement as to the total cost of the former power station, lands, buildings, and equipment?

A. Mr. Drum put in testimony as to the abandonment of the power station. That was a Superior power station, not the Duluth station.

Q. Yes, that is right. A salvage realized from the sale?

A. Yes, I think so.

Q. And interest on the salvage?

A. I think he considered that.

Mr. Mitchell: Mr. Richards, there is an end to all things. That decision which you have in evidence speaks for itself. Do you think that all this is in order?

Mr. Richards: I certainly do, or I would not be here.

Mr. Carmichael: Do you submit that the Wisconsin decision is a defense in this case?

Mr. Richards: We are going to do it here. We are going to offer it pretty soon, or have offered it.

The Master: I do not think you have offered it. I think you have identified it.

[fol. 581] Mr. Richards, continuing:

Q. And was the same theory of taxes to be allowed on the power plant brought forward in that case, to your recollection?

A. I think it was the same principle.

Q. And insurance on the power plant?

A. I think the same.

Mr. Richards: Now we offer in evidence this Exhibit M.

Mr. Carmichael: Objected to as incompetent, irrelevant, immaterial, hearsay, and neither evidentiary or of probative force.

The Master: Received, subject to the objection.

(Mr. Richards read Exhibit M.)

Mr. Richards: I call the Court's attention to the fact that the working capital by that decision was put, for the Superior division, at $9,670, compared with their discussion of the working capital approved and allowed by the Railroad and Warehouse Commission of Wisconsin to the Duluth division at $30,000. As to the balance, that will be matter of presentation later in argument.

Mr. Richards, continuing:

Q. Mr. Gifford, it was in evidence here,—has it not been—that the percentage of property in the Superior division and in the Duluth division, properly apportioned, would represent 70.61 per cent for the Duluth division, and 29.39 for the Superior division?

A. I think Mr. Warren testified that on the basis of cost of the property, that would be the percentage,—70.61 per cent represented the Duluth portion, and 29.69 the Superior division.

The Master: That was accepted by both sides?

Mr. Richards: It is Mr. Warren's statement.

The Master: Well, is that accepted, or does Mr. Gifford give other evidence on that?

Mr. Richards: I was going to ask him a question based upon that as a fact. It won't be contested by our friends on the other side, because that is their own statement, their own apportionment, and their own evidence.

The Master: The only thing is, if there was a consensus [fol. 582] of opinion as to how the property should be apportioned, I would like to put it down here. Mr. Robertson divided the stocks and bonds,—the apportionment.

Mr. Richards: When it came to the element of the actual cost of the property of the two divisions, Mr. Warren stated that 70.69 was the proportion for Duluth, and 29.39 for Superior.

The Master: And is that accepted by the City, and the State, as to the cost?

Mr. Carman: As to book cost, yes.

Mr. Mitchell: Yes, as to book cost.

Mr. Richards: We can refer to a certain Exhibit——

The Witness: Exhibit 26.

Mr. Richards: I call the Court's attention to Complainant's Exhibit 26, which was a statement of material and supplies on hand June 30, 1923, and the note at the bottom states: Apportioned to Duluth division on this casis of cost of property as at December 31, 1922, Duluth 70.61%; and to the fact that Mr. Warren made a further answer to that, saying that the balance, 29.39%, would be properly apportioned as the cost of the property to the Superior division, and Mr. Warren put that on the basis of actual book cost.

(To the witness:) What was the rate base established by the Wisconsin Commission in its said decision?

A. $1,225,000, I think.

Q. Taking that rate base as for the Superior division at $1,225,000 stated by the Commission of Wisconsin, on the basis of the apportionment for Duluth, at the cost of the property according to the book record, 70.61, and the Superior 29.39, what would be the corresponding rate base in Duluth, or base on the Duluth division?

Mr. Mitchell: That is objected to as immaterial and irrelevant, no foundation, no evidence before this court as to what the evidence was before the Wisconsin Commission.

The Master: Objection noted, and exception.

[fol. 583] A. $2,933,731.

Q. Now, Mr. Gifford, as an accountant, you spent a good deal of time on the books of the Duluth Street Railway

Company, from 1900 on, to find their whole history record, financial and otherwise, did you not?

A. Yes, I did.

Q. And the exhibits that you prepared and which were before the Commission, of course, related to the Duluth division?

A. Yes, sir.

Q. But at the same time those books had the records in regard to the Superior division, did they not, from 1900 on, being a part of the financial history and records of the Company?

A. Some of their books had, and some of the books did not have anything relative to the Superior division; the general books did, and the divisional books did not.

By Mr. Carman:

Q. Mr. Gifford, will you please refer to your City's Exhibit J?

A. I have it.

Q. Page 49?

A. Yes, sir.

Q. This page sets up some figures which were included within the agreed figures between you and Mr. Drum?

A. Yes, sir.

Q. And in this page there is a column showing the condition per cent of the various items of property to which you both agreed?

A. Yes, sir—Condition percent?

Q. Yes.

A. Well, Mr. Drum and I did not agree on the condition percent.

The Master: There was no agreement on that.

Q. Well, what part of that did you agree upon?

A. We agreed upon the number of feet of track, and reproduction cost, and scrap value. The per cent condition, we differed on. It might be that Mr. Drum and I did happen to agree upon that one point in some of these items.

Q. Well, does this page then show your own estimate of the conditions percent?

A. Yes, sir.

[fol. 584] Q. And not those of Mr. Drum?

A. This does not purport to show Mr. Drum's estimate.

Q. Has anything occurred, to your knowledge, since, which indicates that your estimate of condition per cent on any of this property was too high or too low? (No answer.) Well, I will withdraw that question, and ask it in another form: Referring to the Superior Street property shown on this page 49, and the condition percent, and depreciated value, I will ask you to state whether or not anything has a occurred since making this report to indicate whether the estimate there made was too low or too high, with reference to the Superior Street property?

A. I imagine you refer to the track between Eighth Avenue West and Eighth Avenue East, where I put a percent condition of 30% on the property. Some of that property was renewed during 1922, according to Mr. Warren's exhibits and testimony. I suppose you refer to the fact that 30% might be too high, with only one year's life left in it?

Q. That would be too high, if only one year's life were left in it?

A. Yes, that was probably a little bit too high under those conditions.

Mr. Carmichael: We, Mr. Gifford, wasn't that due to civic improvement—repaving of that street at that time?

The Witness: Well, I suppose that is so. In other words, I felt at the time that this was made that there was thirty per cent of the value left in there, if it were abandoned or replaced or torn up—with only one more year's life. I don't mean that the mere estimate of the life then remaining should be changed, but it means that on the other hand there was not but one year's life left in it,—considering it obsolescence, or civic improvement, or whatever it was.

Mr. Carmichael: That it was not due to the condition of the property itself, but was due to something that the Company had no power over,—the City ordering the street to be paved, it became a practical matter to relay the tracks at that time.

[fol. 585] A. I cannot testify as to the City ordered the street to be paved. I suppose it did.

The Master: I think if Mr. Gifford is at the present time of the opinion that the average condition percent which he gave of 83.2, I think it was, was either too high

or too low, he ought to state that generally. It seems to me difficult for me to work out what effect that change (if there is any change in that particular item) what the effect on the property would be.

Mr. Carman: I did not intend that, perhaps. My question was only directed to this: that there is a slight difference between the conditions of the findings as to the percentage and the estimate of any one of the engineers, and if even some part of the engineers' estimates were shown by the facts to have been too high, why to that extent it justified the Commission's conclusion at that time.

Mr. Richards: Referring to the City's Exhibit K that was put in yesterday, the question came up as to whether the City would put in certain pages of that, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21,—10 to 21 inclusive. It is our purpose not to introduce those pages, and they are detached from the City's Exhibit K, but the graph will remain as a part of the Exhibit.

The Master: Those are the pages referring to the estimates of the operating expenses from 1922?

Mr. Richards: Yes. They can easily be detached without interfering with the main exhibit.

Mr. Carman: May I ask that some of those be not detached, as we may come to them in our testimony?

Mr. Richards: You may cross-examine, so far as the City is concerned.

[fol. 586] Cross-examination:

By Mr. Carmichael:

Q. In City's Exhibit A, page 4, you speak of a table of dividends for the years 1909 to 1920?

A. Yes.

Q. Why didn't you speak of the dividends prior to 1909?

A. I don't remember.

Q. There were none?

A. Maybe not.

Q. That is right, isn't it?

A. Maybe not.

Q. Except $2,400 in the year 1883, is that accurate?

A. I didn't go back to 1883, but I think your statement is correct.

The Master: What was the statement?

The Witness: That there were no dividends paid back of 1909.

Q. Never, prior to 1909, except $2,400 in toto, that was paid in the years 1883-84.

Mr. Richards: Well, wouldn't — be better introduced by yourself?

Mr. Carmichael: I am just introducing it.

The Master: That was for both years?

Mr. Carmichael: That is the total amount, I think it was $1,200 for each year.

Mr. Carmichael:

Q. Mr. Gifford, your report contains no item concerning cost of power contract?

A. No, sir.

Q. Or the value of the power contract?

A. No, sir

Q. Is it not fair to say, Mr. Gifford,—Wouldn't it be fair to put a value on the power contract, by getting the annual saving from the purchase of the power, and multiplying that by the number of years the contract has to run?

Mr. Richards: Objected to as not proper cross-examination, there being no evidence on that point.

The Master: Objection noted.

Mr. Richards: If you wish to make the witness your own witness, do so. In fact, instead of having any presumption [fol. 587] on that point, from facts and circumstances, we have denied any value altogther.

The Master: But doesn't that raise the issue? This witness has prepared a statement of value and the proper rate base, in which he eliminates an item that, it has been claimed, should be included, and which the Commission found. Now, isn't cross-examination proper as to why that was eliminated, if he is introduced here as an expert?

Mr. Richards: All right. Exception.

A. That should be one of the conditions to be considered, but I cannot say that that one method would be the fair method.

Q. But it would be fair to arrive at the deterioration in the value of it, in that manner, would it not?

A. I think not, because I think you would not be allowing the community or the street car riders any benefit for the location of the city near a hydro-electric plant. In other words, there would be no advantage that the community would get, but the Street Car Company would get it under those conditions.

Q. Don't you think it should be divided fifty-fifty?

A. Some division. I don't know that fifty-fifty would be correct. If you are going to use that basis of valuation, some division would have to be made.

Q. And when you answered the same question in the hearing before the Railroad and Warehouse Commission on January 11, 1922, in this language, "That would be a way of arriving at it, I think that would be fair"——

A. Well, it is one of the methods. You asked to capitalize all of the saving. I think my testimony before the Commission was that I would not capitalize all of the saving.

Q. Mr. Gifford, do you distinguish between cost of financing and bond discount?

A. No. I considered that cost of financing was bond discount.

Q. During the war the United States Government sold [fol. 588] several billion dollars of Liberty bonds?

A. Yes.

Q. Sold them to the public at par?

A. Yes.

Q. The United States Government carried on an extensive advertising campaign relative to the sale of those bonds?

A. I think it did.

Q. And citizens throughout the United States devoted their time and service to the dispensing of those bonds to purchasers and investors?

A. Yes.

Q. And advertising and that kind of effort cost something,—didn't it?

A. I imagine it did.

Q. That would be their way then to consider the price paid for that effort, as cost of financing?

A. Yes, cost of financing the Liberty bond.

Q. So far as the bond end of it is concerned. The Northern States Power Company, which operated in Minneapolis, handles the sale of its own securities, does it not?

A. At least its preferred stock, I think.

Q. Maintains offices?

A. Yes, sir.

Q. And salesmen?

A. Yes, sir.

Q. And disposes of its securities direct to the public without going through the handles of the bond house or investment bankers?

A. I cannot say as to those bonds; but as to its preferred stock, I think that is its procedure.

Q. Is it fair to say that the item of expense so incurred, and their advertising, circularizing the investors, maintaining offices and salesmen, is the cost of their financing of the property, in so far as the sale of the preferred stock is concerned?

A. Yes, their method of financing. There is a cost there on those items—certainly.

Q. So there is a difference between cost of financing and bond discount?

A. Well, if you consider the two items as separate, there is a difference; but I could not find, in the Duluth Street [fol. 589] Railway, where there had been any cost of financing not covered by other items of expense, except the bond discount. That is why I eliminated it.

Q. I think, on the working capital, you said something yesterday concerning the amount you thought necessary for a concern such as the Duluth Street Railway Company to have, if it was a going concern and then just starting out in business, with complete working unit, and business worked up?

A. That was on going value, not working capital.

The Master: No. I think Mr. Carmichael is right.

The Witness: Then I misunderstood.

The Master: You said that if the Company was equipped and ready to start business, you considered that $25,000 would be sufficient cash balance.

The Witness: Yes, that is right.

Q. If that is true, isn't it true that working capital should include some sum for capital expenditures to be made during the ensuing year, so that the company can take advantage of trade discount on what it purchases, so that it can take advantage of market conditions?

A. It is true that the Company will necessarily—will be obliged to have certain money on hand for construction purposes; but of course, in determining the cost of property, we have considered interest during construction, which would compensate the company for going to the bank and borrowing money to use for that purpose.

Q. That item of working capital required for construction purposes was not included in your item of $25,000?

A. No, I included nothing in the $25,000 for construction purposes, for the reason mentioned.

Q. Relative to overheads, the four qualifications for general overheads are: (a) Engineering and Superintendence; (b) Administration, organization and legal; (c) Taxes during construction; (d) Interest during construction.

A. I think that is correct; yes.

[fol. 590] Q. I notice, in making computations, as estimates, that you have allowed, on each of the four bases,—that on interest during construction you allow a different rate, if I figure my percentages correctly; on present-day prices you compare with the 1915 prices, and investment basis. What is the difference?

A. I will have to refresh my memory on that. You mean, what is the difference in percentage, or why should there be a difference?

A. The difference in percentage. It would be the difference you have as between basis 1 and basis 3.

The Master: That is in Exhibit "I," is it not?

Q. Yes. I think Mr. Gifford made a difference of 2¾%.

A. On Basis 1, I used 10.25; and on Basis 2, 11.25; on Basis 3, 14%; and on Basis 4, 10.25%.

Q. There I want the different spread between your one item of interest on construction between Basis 1 and Basis 3.

The Master: Those were all what you call overheads?

A. Yes. I figured 12%, or a difference of 2.75% between Basis 1 and Basis 3, because of higher interest rate and higher tax rate and higher administration expense on present day prices, than I would have considered on Basis 1 or Basis 4, because of the higher rates then prevailing, taxes, interest and salaries.

Mr. Carmichael: That is all.

Examined by the Master:

Q. I want to ask Mr. Gifford one or two questions. Did you ascertain these reproduction costs by use of a formula, or what assumption did you make in getting these reproduction costs?

A. The detail work was first done by going over the Company's records of its purchases and payrolls, to find out what the company had paid for various classes of material and labor during its history, for each year. We then determined the amount of property that was installed that year, and applied the prices which the Company paid for the material installed each year, and used that as a re- [fol. 591] production cost unit price for Basis No. 4. Then we applied prices in effect in 1915, from the Company's records of purchases in 1915, in so far as we could determine for all of the items of that year. In other words, some of the equipment which was installed was not purchased by the Company in 1915, or at 1915 prices. So, where we could not find any direct record in the Company's record, we then based that unit price upon other company experiences and data which we had relative to the purchases of the year.

Q. Did you confine your investigation of prices to the prices which the Company paid, or did you take all the information you could find as to current prices?

A. No, we took all the information we could find as to correct prices, as well. But wherever the company's own records showed something in detail we took that in preference to current prices. Where the Company's records were lacking, we used the current or customary price.

Q. Did the Company's records show anything with reference to these overheads?

A. The Company's records showed something as to overheads, but nothing that Mr. Drum's men or I could tie indefinitely.

Q. Then the overheads applied to the 1915 prices or to the investment cost were assumptions entirely?

A. Yes, sir, on the percentage basis. After 1921 we worked out the increase due to quotations and purchases, first from the records we could find of the Company's purchases, and where that was lacking, from information of prices generally, and worked out the unit prices used in

Basis No. 3. It so happened where they were worked out that Basis No. 1 and Basis No. 4 compared so closely that you could almost consider the investment unit price to compare with the plateau of prices effective in 1915. As a rule, the unit prices were first determined from the Company's purchases, and when they were lacking, then the general prices and quotations were considered.

[fol. 592] Q. That describes 1, 3 and 4. How about 2?

A. 2 was taken from an average which we worked up as a percentage basis on the quotations in effect over that perior. We did not pay as much attention,—(at least, I did not,—and I think Mr. Drum did the same thing)—as much attention to the Company's actual records, for the ten years, but we compared it on the basis of general quotations for that period.

Q. Columns 3 and 4 were prepared on the assumption that the Company was now required to go into the market and purchase the material and install it?

A. Basis No. 3 was that way. Basis 4 is the investment basis.

Q. I said 2 and 3. I thought you said—Pardon me. I meant 2 and 3.

A. Yes, that is right.

Q. Is that the cost of re-financing and re-organizing the company?

A. Yes, sir,—my cost of financing, under Basis 2, is on that basis, yes, sir.

Q. Assuming that the property actually in use, and which has been the plant of the going concern for a reasonable length of time, acquires some additional value from that use. From what sources does that increased value arise?

A. As I get your question, Your Honor, the item of land would increase, because land generally has increased.

Q. Well, we are not speaking of land.

A. Well, I cannot see why any piece of property should increase in value due to its use. Maybe I do not understand your question.

Q. Well, as I have said, assuming that the plant of the going concern, which has been a going concern for a reasonable length of time, has in the aggregate more value than the property as it was originally constructed,—what gives it that value, that additional value? I am speaking now of the item of going value. I want you to analyze that.

[fol. 593] A. Well, the thing that gives it a value as a going concern is the fact that it is a living, going thing, compared to an assembled lot of physical property. And that, I think, does increase the value of the property in addition to the physical property.

Q. And that increases the value of the physical property?

A. No, not necessarily. It increases the property as a whole, and of which the physical property would be a part.

Q. Do you include in going value the street car habit that has been spoken of here?

A. I think the street car habit would have something to do with the going value, in so far as the Company had been instrumental in building it up. In other words, the good street car riding habit might be here, and the Company may have had nothing to do with it, but I think in this case it should be considered, because I feel that the Company has had something to do with the street car riding habit. They have had good service, and that had a lot to do with building up the street car riding habit.

Q. Speaking of going value, you include the character of the service that has been rendered, and the efficiency of the management?

A. Yes, sir.

Q. The courtesy of the conductors?

A. I think courtesy of the conductors is a part of the efficiency in management, and stimulates the riding habit.

Q. That is all goodwill, isn't it? All those are elements of goodwill?

A. No, I don't think that is goodwill. It may be goodwill, but it has cost the company something. Goodwill, as I understand it, is the quality a property might have which would attract people to it, as compared to some competitor.

Q. This physical property would be a comparatively small value, if it was taken out of its present environment?

A. Practically nothing.

Q. So that, in getting these reproduction costs, in so far [fol. 594] as we assume that the reproduction cost is evidence of value, you are speaking of it as it is in place, as a part of this entire plant?

A. Yes.

Q. And you have included every item of expense which would be incurred in putting it in place as a part of the entire plant?

A. Yes.

Q. Then, regarding the going value as an element attached to the physical property, what have you omitted from your estimate of the cost of reproduction?

A. Why, I omitted, in the case of reproduction, the cost of accumulating and training an organization to operate the property; the cost of accumulating the business of the company, and the cost of developing efficiency throughout, other than the organization. I think the power contract should be considered as a going value item; and I can see no reason to itemize the power contract value and separate it from going concern value. I think that the power contract value, if there, should be considered part of the going value. That is one of the things that has been developed by the Company. Now, it is true that that development has been paid for out of the operating expenses of the Company; and yet the value is here today in the property. It seems to me that if you only build up the cost of the physical property, with such overheads as would be properly applied to the physical property (that is, engineering, superintendence, construction, supervision, and so forth), eventually you arrive at a point where your physical property is all assembled, but you have not as yet gotten a going concern organization,—an efficient operating outfit; and it is the cost, or the value based upon that cost, which should be considered as going value.

Mr. Carmichael: We have no more questions.

[fol. 595] By Mr. Richards: And in this case, Mr. Gifford, there is no specific evidence of what that cost was, that you last mentioned?

A. I don't know.

Q. That last statement that you made there, I am referring to,—in your answer?

A. You ask me to say whether in this case there is any evidence? I am not familiar with every exhibit that went in, so I cannot answer that question.

Q. I am speaking of the developed physical property, all ready to go, and then the difference between that——

A. Yes, I think there is some evidence. There are some facts to show a going concern value, outside of the physical property of the inventory. The exact weight of those facts must be considered as a matter of judgment.

Q. I mean, there is no specific evidence here as to the difference between the value, assembled, of this plant, ready to go, and the time when it is actually operating as a complete physical, going concern.

A. I do not think there is anything in evidence as to the detailed statement of that, no.

Mr. Richards: That is what I mean. That is all.

[fol. 596] Afternoon Session

2 p. m. August 24, 1923.

H. S. Kempton, sworn, testified as follows:

Examined by Mr. Richards:

Q. What is your present occupation, Mr. Kempton?

A. Manager of the Bond Department, City National Bank, Duluth.

Q. How long have you occupied that position?

A. About two and a half years with the City National Bank.

Q. Of the City of Duluth?

A. Yes, sir.

Q. And prior to that what was your occupation, immediately prior?

A. I was manager of the Bond Department of the F. J. Salter Company.

Q. And how long did you continue?

A. About a year and a half.

Q. And prior to that, immediately?

A. I was in the service, prior to that.

Q. I will ask you to state to the Court, if you know, what was the re-discount of the Federal Bank of the United States in the month of July, 1922?

Mr. Carmichael: Objected to as immaterial.

The Master: Objection and exception noted.

A. In the twelve Federal Reserve Districts, the discount rates were as follows: New York District, 4%; Boston District, 4%; Minneapolis District, 5%; Federal Reserve District for Duluth, 4½%; Cleveland, 4½%; Rich-

mond, 4½%; Atlanta, 4½%; Chicago, 4½%; Kansas City, 5%; Dallas, 5% and San Francisco, 4½%.

Q. What was the rate of interest payable under the state law of Minnesota on capital represented by checks and judgments?

A. To the best of my knowledge it was 6%.

Q. How long has that condition of affairs existed?

[fol. 597] The Master: Well, since before he went into the service, I know that.

Mr. Mitchell: Probably since before he was born.

Q. Yes, I think so too. I will ask you to state, if you know, what is the rate or was the rate permissible by the United States law for farm loans in 1922?

A. Under the Federal Farm Loan Act?

A. Yes.

Q. Yes.

A. I am not certain. I believe it was 5½%.

Q. Has your business connected itself with the matter of current rates or charges for real estate loans, first mortgages, in Duluth?

A. Yes. On large loans.

Q. And as applied to the time of say July 13, 1922, what was the ordinary, usual and customary rates of interest charged on such loans?

A. Large loans, too large to be sold as first mortgage, were placed at 7%.

Q. What was the current rate of charge on ordinary loans on real estate in the City of Duluth?

A. I believe that smaller loans were being placed at from 5½ to as high as 8%, depending on the security.

Q. First mortgage?

A. Yes.

Q. Is there such a thing as a current bank rate or charge on commercial loans?

A. That varies with the particular account in question, from one-half to one per cent, different at times.

Q. What would you say as to the fair and ordinary rate in Duluth on commercial loans?

A. These loans are on such widely different securities and made by those whose responsibility varies so widely, that it is pretty hard to define a single rate.

Q. Yes, well, I will make that more definite. On well established businesses, using comparatively large amounts of money, what would you say, in July 1922, was the fair charge?

[fol. 598] A. From 5½% to 6%.

Q. Would that apply to wholesalers?

A. Yes sir.

Q. Financing their customers and their business?

A. Yes, sir.

Q. And large manufacturing enterprises?

A. For their current loans, yes.

Q. Are you familiar, or can you state, what rate of interest is charged on issued bond issues of the City of Duluth? That is if any were issued in the latter part of 1922 and subsequent to July 1st.

A. It is my recollection that Duluth Municipals at that time, one or two issues, sold at 4¼% basis retail.

Mr. Carmichael: Not the price paid to the City?

A. No, not the price paid to the City. That would be somewhat less.

Q. Are you aware of Municipal Bonds, issued by the City of Minneapolis, for instance, about that time, and what the rate was that they bore?

A. Bonds of like maturity of the City of Minneapolis would probably yield from one-tenth to three-tenths per cent less than the City of Duluth bonds.

Q. What figure then, would you name for Minneapolis?

A. About 4.15 basis I would say. I know that only in a general way, not having seen any of the issues at that time, as I recollect.

Q. That would be involving large amounts of money?

A. Amounts of $50,000 or over, probably.

Q. Do you happen to know what the rate of return allowed by the Interstate Commerce is on the valuation of steam railroads of the United States?

A. As I recall the Transportation Act, the rate of return allowed is 5¾%, for a certain provision for the use of the reserve created out of the additional earnings after that reserve has reached a certain percentage.

[fol. 599] Q. That is, after it has reached the percentage of six per cent?

A. The surplus over six per cent is divided, I believe, evenly between the Government and the Road. However, that reserve must be held by the Railroad in reserve until it has reached a certain proportion of its earnings, or valuation.

Q. What would you say, Mr. Kempton, as to the salability of a stock of an institution like the Duluth Street Railway Company, providing that the stock had in recent years earned, say, as much as 8% dividends, upon itself and had a reasonable prospect of continuing to pay 8% dividends on the stock, would it be salable in the City of Duluth?

Mr. Carmichael: Objected to, no foundation laid, not qualified, we don't know if he ever held a share of stock in his life or not.

Q. Well have you had anything to do with the business of selling stock?

A. While I was with F. J. Salter Company they handled a few shares of Conservative Preferred stock.

Q. That was over five years ago, about three and a half years ago, if I understand you?

A. A little over four years ago.

Q. And do you feel competent to express an opinion on the question that I asked?

A. I feel that, knowing the facts, I could gauge the likelihood of an issue being sold successfully.

Q. What do you think of that proposition then on an 8% basis for stock of the Street Railway Company?

A. Do you mean any additional issues, to what they have already — out, Mr. Richards?

Q. What is not yet issued. There are $200,000 of the stock that might be apportioned, say, two-thirds to Duluth and one-third to the Superior Division, that has not yet been issued.

A. How much of that stock?

[fol. 600] Q. Two-thirds of $200,000 par value.

A. I see. I would hesitate to attempt to sell that stock, I think, on an 8% basis, or would hesitate to underwrite it under present conditions. Of course, upon the meagre knowledge that I have of the company and its earnings, and franchises, and the law, I do not think I especially feel qualified to make a definite statement on that.

Q. I see. Well, what would you say of the proposition on an ordinary business in Duluth, established, of somewhat large dimensions, and that had been paying dividends of 8% on the stock, and with nothing to indicate that it would not continue in its business as a going concern, and earning money, and capable of paying dividends of a greater or less degree,—of being sold on a basis of 8% for the stock.

A. A preferred or common stock?

Q. Preferred,—well we will say the preferred.

The Master: There is no preferred of the Street Railway Company.

Mr. Richards: There is none here, no, I suppose it is all common.

Mr. Carmichael: And it is not an ordinary business either.

Mr. Richards: I will agree with you on that, but I am asking his opinion.

The Master: Oh, you are not confining this question to the Duluth Street Railway?

Mr. Richards: No.

The Master: Well then, you can say as you will, of course, I beg pardon.

Q. Say the Marshall-Wells Company, the Minnesota [fol. 601] Steel Company, the Scott Company, or any wholesale company in the City of Duluth, manufacturing companies, factories?

A. I believe it could be sold on 8% basis surrounded by the usual conservative safeguards.

Q. And you would say that situation existed in July, 1922?

A. Yes.

Mr. Richards: You may inquire.

Cross-examination.

By Mr. Carmichael:

Q. Mr. Kempton, your folks live at Avondale?

A. No sir.

Q. Are you a Duluth boy?

A. Yes sir.

Q. What is your age?

A. Twenty-nine.

Q. And these municipal securities like the City of Minneapolis and the City of Duluth, they are tax exempt?

A. Yes sir.

Q. Federal Farm loans are also exempt?

A. Exempt from Federal Income Tax, yes.

Q. What is the reason for this difference in this rate, of the Federal Reserve Bank discount, you have spoken of, as July, 1922, New York being 4% and the Minneapolis 5%, why that spread of one point?

A. It is due, I believe to the difference in the demand for loans in the different districts.

Q. Due somewhat to locality?

A. Yes, and the industries and activities of different localities.

Q. There also is a difference, as a rule, between New York and Minneapolis, is there not?

A. Minneapolis is usually higher.

Q. About one point?

A. I believe the difference ranges between one half and one per cent.

Q. Are you in the underwriting syndicate which purchased just last week $400,000 in the Village of Mountain Iron?

A. Yes sir.

[fol. 602] Q. There are four Duluth banks in that syndicate, are there not?

A. Yes sir.

Q. And the Village of Mountain Iron is in St. Louis County?

A. Yes sir.

Q. And you purchased those bonds on practically six per cent basis, did you not?

A. Yes sir. They were brought to yield something less than six per cent.

Q. What premium did you pay on the $400,000?

A. The bonds were bought at par point 60.

Q. What do you mean by that?

A. $6.00 a thousand.

Q. And they average seven and one-half years maturity?

A. I believe the average maturity is less than that, is it not?

Q. You advertised this morning to the investment buyers on a basis of 5 for the short and long time securities and 5¼ intermediate securities?

A. Yes.

Q. What is the difference between the basis on which you buy them and the basis on which you are selling them to investors?

A. Expense and profit,—of risk.

Q. Your expense of advertisement, and selling and having the bonds printed, paying for legal opinions and such matters as that?

A. The risk of carrying, risk of fluctuation.

Q. Yes. Now you have never, in Industrial securities, been a party to any underwriting contract, have you?

A. Yes.

Q. What?

A. The McDougal Terminal.

Q. That is a bond issued on the McDougal Terminal of this city, and those bonds are 7% bonds, is that right?

A. Yes.

Q. They were sold to investors on what basis?

A. 7%.

Q. How much did the McDougal Terminal get for those bonds, what did the bankers pay for them?

[fol. 603] A. We were members of the secondary group.

Q. You were the members of the primary group?

A. Not members of the primary group.

Q. You don't know what the primary group paid for them?

A. No sir.

Q. You don't know whether they paid 92 or not?

A. No sir.

Q. Do you know whether the average rate of interest being paid by the McDougal Terminal on that issue including the cost of putting out the issue, the amount paid the investment bankers for handling it, runs about 7.8%?

A. I should think it would be about that. I don't know the facts.

Q. You only regard those loans as coming up to the value of one-half of the security, do you not?

A. Approximately that, differing with——

Q. Have you handled any Duluth Street Railway bonds recently?

A. We have within the past six months or a year.

Q. At what price were those being sold by your concern?

A. Which issue do you refer to?

Q. Well let us take the first mortgage.

A. The last sale that I recall, perhaps about three months ago, of the first mortgage bonds, was at 92, I believe.

Q. 92, what basis would that be?

A. That would be about a six and one-half basis, I think. I can tell you that in just a minute.

Mr. Mitchell: When did they mature, 1930?

A. In May, 1930, six and a half years, 92.15 would be the six and one-half basis.

Mr. Carmichael, continuing:

Q. Now about the general mortgage bonds?

A. At that time they were selling about ten points under [fol. 604] the first mortgage bonds.

Q. They were selling then at about 82?

A. Yes sir.

Q. What basis would that be?

A. Approximately 8.70.

Q. There is a good deal of uncertainty in the minds of investors about Street Railway securities, is there not?

Mr. Richards: We object to that, not proper cross-examination on the basis of the facts elicited.

Mr. Carmichael: You put the gentleman on there as a financial expert.

Mr. Mitchell: We put him on to tell certain conditions, certain specific facts, not as a general expert.

The Master: Objection noted.

Q. There is an idea of uncertainty in the minds of investors as to Street Railway securities, is there not?

A. Generally speaking, yes.

Mr. Richards: We have another witness, Mr. Scott.

Mr. Scott being here, the City offers him as a witness again.

J. A. Scott, recalled, testified as follows:

Examined by Mr. Richards:

Q. You stated that you were thirteen years an assessor of the city of Duluth and that prior to that time you were in the real estate business, running back a number of years. Among your other occupations, could you fairly be called at times a banker?

A. I assisted in the organization of the Western State Bank twenty years ago, and acted as cashier of the institution for something over one year, and during all the time since then I have been a director of the bank and most of the time a member of the Discount Committee; more re- [fol. 605] cently on the Examining Board of the bank.

Q. And that runs back for twenty years, I assume, then, that you have been more or less familiar with general conditions that the bank came in contact with in the City of Duluth during that time.

A. Yes sir.

Q. And judging from your position as a member of the Discount Committee I would assume that you made it a business somewhat to look into the nature of the securities offered?

A. Yes sir.

Q. And that would imply some knowledge, more or less extensive, of the existing resources of the City of Duluth in various ways, commercial and industrial and economic?

A. Yes sir.

Q. And you have said that you were familiar, I think, with the matter of interest rates, on real estate loans, during that time?

A. Yes sir.

Q. Calling your attention to the date of July 13th, 1922, I will ask you if you will state what was at that time a fair going rate of return allowed as interest on first mortgage loan securities running back some considerable length of time.

A. 5½ and 6%.

Q. Did your bank ever happen to have financial relations—that is was the Street Railway Company ever one of your customers for temporary loans?

A. No sir.

Q. Taking into consideration as of that date, what would you say was the current rate for financing the needs of the large wholesale commercial houses, of the City of Duluth, in the grocery business, hardware business and general wholesale business such as your knowledge shows to be existing here.

Mr. Carmichael: Objected to. This gentleman has not shown that he is qualified to testify on a question of that kind.

[fol. 606] Mr. Richards: If he is not, I think he will say so.

The Witness: I think I can answer the question.

Q. (Read by the reporter.)

A. From one-half to one per cent above the Federal Reserve Discount rate.

Q. The Federal Discount rate about that time in Minneapolis, that is in this Federal District, was 5%?

A. The first of July it was 5%.

Q. And your answer would mean then, from 5½ to 6%?

A. Called secured loans at 5½. Loans of large amounts probably might run as high as one per cent over and above that rate.

Q. That involves a considerable use of money, to finance these large institutions, I would assume. What is your opinion about that?

A. Yes they do, at times, borrow a great deal of money.

Q. Would they touch a loan of as high as a million or a half million?

A. I would doubt if any one bank here would take a loan as high as a million, or even perhaps as high as half a million, but they would loan a quarter of a million and perhaps more than that.

Q. Do you know about that time, or approximately, what the call rate was on the money that the bank used to finance the heavy movement of crops, so far as Duluth has anything to do with that?

A. There is not very much money used for the handling of the crops during the first part of July.

Q. No, but,—well take it later, what is the rate in the Fall, August and September?

A. About 4¾ to 5½ per cent.

Q. Do you know what the rate of return is allowed for the railroads of the company by the practice of the Interstate Commerce Commission? If so, you may state that? [fol. 607] A. Yes sir. 5¾%.

Q. What is your understanding as to the amount of capital invested in that business?

A. About eighteen billion dollars.

Q. Coming down to the Duluth Street Railway Company what is your idea of the nature of the permanency of that business in the City of Duluth?

A. I do not think that there is any question but it is a permanent institution.

Mr. Carmichael: It has been here ever since you have been here?

A. Yes, always been here.

Q. It has been constantly increasing in its development, the amount of capital invested, with growth of the city?

A. Yes sir.

Q. Do you consider that there is any real risk of the failure of that business in the City of Duluth, under efficient management?

A. No sir.

Q. What is your idea of the salability in 1922 of stock of any concern like a wholesale house, a retail house and a factory, or any enterprise which was going, or was going, and had paid or was reasonably likely to pay a return as high as 8% on its common stock? Would such securities, generally of that kind, be salable at that time?

A. Common stock, did you ask?

Q. Yes.

A. Yes, any stock that would show a reasonably permanent earning of 8% would be salable.

Cross-examination.

By Mr. Carmichael:

Q. Do you know of any sales, of the Duluth Street Railway stock, between 1884 and 1909?

A. I don't for that period; that was before I was in the office.

[fol. 608] Q. Then, if from 1884 to 1908 this company never paid any dividends, you would not consider that an extra good stock to buy?

A. I don't know the conditions of the company prior to 1909.

Q. You are connected with the Western State Bank?

A. I am a small stockholder and director.

Q. What is the capitalization?

A. $50,000.

Q. The surplus?

A. $35,000.

Q. And being in the banking business, that is the limit of your experience?

A. Excepting that I borrow from all the banks as much as I can.

Q. You borrow once in a while. Well in this borrowing you have a statement of financing commercial houses here in Duluth at rates paid in July '22, is that what you call commercial loans?

A. Yes.

Q. Short times loans, 60 to 90 days?

A. Yes.

Q. And banks loan that much money that way?

A. Yes.

Q. To what extent of their capital and surplus?

A. 15%.

Q. Your bank is a state bank?

A. Yes.

Q. And you are allowed to write up as high as 15% of your capital and surplus to one borrower?

A. Yes.

Q. Why don't you loan 50% to one borrower?

A. Well for the reason you stated, the law does not permit us to do so.

Q. Do you know why the law does not permit you to do so?

A. It would not be well for us to have too many eggs in one basket.

Q. Well then the ability of the borrower to pay enters somewhat into whether the banker will loan money or not?

A. It should and does.

Q. And then when the Street Railway Company borrows money on a mortgage, its property is pledged for the pay-
[fol. 609] ment of that money?

A. Yes.

Q. And when the commercial house gets money on short time paper, the full faith and credit of that commercial house to pay is pledged for the payment of that loan, is it not?

A. Subject to any outstanding bonded indebtedness which the house might have.

Q. Do you require endorsers?

A. In case of a large house with A-1 rating, endorsers are not at all times required. But the general rule, the paper is endorsed, signed by the company and endorsed by some of the officers or directors.

Q. You speak of real estate mortgage with interest at 5½ or 6%, those are usually about three year loans?

A. They generally run five years, some from three to five, but mostly five.

Q. Three to five years, and up to possibly 50% of the valuation of the property?

A. Yes.

Q. And then in addition to that you take a note from the borrower do you not?

A. Yes.

Q. And he personally promises to repay that money?

A. Yes sir.

Q. Those loans are handled usually through real estate agencies?

A. Very largely through what is known as real estate loan agencies, yes.

Q. And do they receive anything for their services in connection with such a loan?

A. They do, from the borrower. The rates quoted are net to the lender.

Q. Now about what does that amount of money paid to the agent amount to, what per cent?

A. Included the expenses of recording papers, and so forth, it would run on a five year loan, between three and four per cent.

Q. I see. So that, say, taking a three year loan, a fellow pays about three per cent commission on that, doesn't he?

[fol. 610] A. It would approximately be more than that, yes.

Q. Three per cent. So that the investor is getting six per cent on his investment, the borrower is paying 7%, assuming a three year loan?

A. I think it would be about that.

Mr. Richards: Mr. Scott, that three per cent means the total?

A. At one per cent a year, it would amount to approximately that.

Q. What does that one per cent, how does that creep in what is it for?

A. That would be the remuneration to the agent for securing for him the money, the collection of interest and remitting it to the lender.

Q. That is, the money that is paid to him for the service that he performs, on the one side, securing the money, and the borrower the other?

A. That is true.

Q. That is somewhat foxy financing, isn't it?

A. Yes.

Q. And that is what it is?

A. It is.

Examined by Mr. Richards:

Q. I don't remember whether you were asked about the tax exemption: what is the tax chargeable in the State of Minnesota on moneys and credits—first I will ask you these matters of bonds come under the head of taxation as moneys and credits under the state law?

A. Yes.

Q. And what is the rate of tax on such?

A. Three mills, $3.00 a thousand.

Q. $3.00 a thousand then is all that a man escapes when he invests his money in tax exempt securities, under the law of the State of Minnesota?

A. As far as the State of Minnesota is concerned, yes.

The Master: That also saves the Federal Income Tax, does it not?

[fol. 611] A. Oh, on Municipal loans, yes.

The Master: One of the questions I wanted to ask you: Mr. Scott, the banking rate given here, that does not represent the profit that the bank makes, does it?

A. No, it does not. It might be more or it might be less.

The Master: Yes, it might be more or it might be less. The return that the bank receives is represented by these entire profits during the year?

A. Yes sir.

The Master: I am not sure whether yesterday, or one day, you testified before,—I am not sure whether you said that the value placed by you as assessor upon the real estate was your judgment as to its full value?

A. I intended so to state.

The Master: Then it is your judgment?

A. Yes.

The Master: Your judgment is that was its full value, from your experience as a real estate man?

A. Yes.

[fol. 612] Colloquy Between Court and Counsel

Mr. Carman: In starting the introduction of testimony on behalf of the defendants other than the City of Duluth, I desire to state first for the record our position with reference to the plaintiff's exhibits, particularly including exhibits one to thirty about which there was some discussion as to what was admitted and what was not. Our position is this: First, in so far as these exhibits, as explained by the testimony of the plaintiff's witnesses, purport to show a summary or compilation of figures appearing in the books of the plaintiff, we admit that they do correctly show and reflect such figures as appear in the books of the plaintiff, and that the books of the plaintiff do actually show the same. Second, that with the exception just stated, we leave the burden of proof where the law puts it, but we do not admit anything further. More specifically, we do not admit that any such book entries or charges were properly made, nor that they represent or show in any way proper or legitimate operating expenses of the plaintiff; nor that any item of the said expenses shown by or included in such book entries, of the plaintiff *or* are prop-

erly chargeable to operating expenses of the plaintiff. Before calling our first witness, I offer in evidence the City's Exhibit A, and the testimony given in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's — A.

The Master: The objection is noted.

Mr. Carmichael: And exception to the ruling.

Mr. Carman: I will also offer in evidence the City's Exhibit B and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit B, and note an exception to the ruling.

[fol. 613] Mr. Carman: I also off in evidence City's Exhibit C and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit C and exception to the ruling.

Mr. Carman: I also offer in evidence City's Exhibit D and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit D and exception to the ruling.

Mr. Carman: I also offer in evidence City's Exhibit E and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit E and exception to the ruling.

Mr. Carman: I also offer in evidence City's Exhibit F and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit F and exception to the ruling.

Mr. Carman: I also offer in evidence City's Exhibit G and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit G and the exception to the ruling.

Mr. Carman: I also offer in evidence City's Exhibit H and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit H and the same exception to the ruling.

Mr. Carman: I also offer in evidence City's Exhibit I and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit I and exception to the ruling.

Mr. Carman: I also offer in evidence City's Exhibit J and the testimony in connection therewith.

[fol. 614] Mr. Carmichael: Same objection as previously noted to City's Exhibit J and exception to the ruling.

Mr. Carman: I also offer in evidence City's Exhibit K and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit K and exception to the ruling.

Mr. Carman: I also offer in evidence City's Exhibit L and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit L and exception to the ruling.

Mr. Carman: I also offer in evidence City's Exhibit M and the testimony in connection therewith.

Mr. Carmichael: Same objection as previously noted to City's Exhibit M and exception to the ruling.

Mr. Carman: I also offer in evidence all the evidence offered by the City of Duluth.

Mr. Carmichael: I don't know whether a blanket objection will cover that or not. But we object to it, on the same ground.

The Master: Note the objection and exception.

Mr. Carman: We made those offers separately because the answers of the defendants are not identical.

Mr. Mitchell: So that there is no misunderstanding later I might suggest that the City has put in no answer. The City is simply in here, and if it is doing anything I suppose it is helping the Commission. It has not put in any answer.

Mr. Richards: There has been an answer filed in the records of the case, an intervention. If it is not in I have had a copy of it which was served on the counsel on the other side and filed in the office of the clerk of the Third Division at St. Paul.

Mr. Carman: I understand that in this court the question [fol. 615] of service is wholly immaterial.

Mr. Mitchell: That is true. If it was filed, it is in, but we have not seen it.

The Master: If there has been no answer, that would be for the Court. I do not think that would properly come within my province.

[fol. 616] Byron T. Gifford, recalled, testified as follows:

Examined by Mr. Carman:

Q. Mr. Gifford, in your testimony for the City, an exhibit was introduced containing a rate study compiled and made by you, the first ten or eleven pages of which were introduced, and the remainder of which was not introduced in evidence by the City.

A. The first nine pages were introduced.

Q. The first nine pages. I want to have you identify and explain this rate study from pages 15 to the close for the purpose of offering it in evidence on behalf of the other defendants. Will you please do so, starting with page 15?

A. Page 15, City's Exhibit K, which is the exhibit you mention, there is a memorandum on the taxes that should be considered for the year- 1922 and 1921, as the correction made for Federal Income tax, and my estimate of the taxes for 1922, exclusive of Federal Income tax, being $80,000.

Mr. Carmichael: Mr. Gifford. Pardon me, Mr. Carman. On that page 15, at the time you made this report you did not allow for Federal Income tax to operating expense, did you?

A. No.

Mr. Carmichael: And since that time the Galveston decision has held that that is properly chargeable to operating expenses.

Mr. Carman: Not the Galveston.

A. My remembrance of the Galveston decision was that it need not be an operating expense, but must be considered. It was taken out of operating expense.

Mr. Carmichael: That is the point I wanted to make.

[fol. 617] The Witness: In Federal Income tax, I took the income tax at $80,000.

Q. Page 16.

A. Page 16 and the curve following that, which is really page 17, and a part of 18, covers a discussion of the probable patronage to be expected by the Street Railway Company, and the final answer to that was I estimated it would be 27,500,000 revenue passengers carried. I state there that that is on the assumption that the riding of the patron-

age will not be affected by the increase in rate, on the assumption that if any increase were made, the rate for the frequent rider would not be raised, and the possibility of jitney competition would be eliminated. I think under the same conditions that Mr. Warner estimated 27,200,000 revenue passengers, I estimated it would be 27,500,000. I show on the graph, which is page 17, the history of revenue passengers and the effect that various things had upon it. If the population of Duluth increases, and if the riding habit remains the same, the actual riding will follow the red line shown as the population line. It will be noted that in the latter part of 1912 the riding went away below that point. Upon investigation I found that there was a strike and that the service had been curtailed, and that that accounted for that. I found 1915 and the 1916, where the riding habit falls low, that was caused by jitney competition, especially noted in 1915, and until about the middle of 1916. I find that in the latter part of 1918 and the first part of 1919, there is a falling off of the travel due to the influenza, during which the health authorities closed many moving picture houses, and so forth. I found that in 1919 and 1920, due to the industrial conditions of Duluth, [fol. 618] and war conditions in Duluth, making the riding good and from there on, travel has fallen off; and on this same curve I platted the riding up to August 1, 1923. That show the effect of extraordinary conditions upon the revenue passengers to be expected that would use the street railway; without those extraordinary conditions I estimated that the expected patronage is 27,500,000.

Q. Referring to the falling off in the latter part of 1922 and 1923, state whether or not in your judgment that has been caused in whole or in part by jitney competition and the six cent fare?

A. Well I think the jitney competition and the increase in fare, the two have had a lot to do with the falling off in travel. I don't know that they are the only two factors, but they are the two main factors I think.

Mr. Carmichael: Jitney competition is not a matter peculiar to Duluth is it, Mr. Gifford.

A. Well no. I think in nearly every town they have had, sometime or another, jitney competition.

Mr. Carmichael: And have it now.

A. Well some towns haven't any now, that is, any of any consequence, and other towns have a great deal now.

Mr. Carmichael: Towns that do not have it, is that due to Municipal legislation on that subject?

A. No, I think not. I have in mind some Wisconsin communities that have in the past had quite a lot of jitney competition, but just as present there isn't any, and there was no Municipal legislation on the subject. It seems to run in spurts or epidemics. I don't think that jitney competition at five cents is economically sound and can exist.

Q. State whether or not, in your opinion, this change in [fol. 619] the number of revenue passengers in the years 1922 and 1923 is greater or less than it would have been if this Commission's rate of fare of six cents cash and five tickets for a quarter had been in effect.

A. I believe that there would have been more revenue passengers if the Commission's rate of fare had gone in effect than with the rate now in effect. To tell you how many revenue passengers additional, I can't say that.

Q. Now on page 18 of this exhibit, under service requirements, will you please explain what follows there.

A. When this report was made up it was necessary to consider the class of service to be required of the company, one of the measures of the service to be required and the number of car miles that the company would be obliged to operate; and the car miles, the revenue passengers per car mile is one of the guides to the quality of the service. It had not been definitely determined, just the relation of revenue passengers to the car miles that would be required of the company. So in order to clear the problem up I set this report of the cost of the service on a basis on which that item or that factor could be considered, and the expected service could be determined under any schedule that would be adopted. The operating expenses of the company increased and decreased, depending upon the revenue passengers per car mile or the number of car miles operated. The fixed costs of the company remained constant; that is, with three million car miles operated per year, which is equal to approximately nine revenue passengers per car mile on a basis of 27,500,000 passengers, the fixed costs, taxes, depreciation, return, certain general officers salaries

[fol. 620] and certain other fixed expense such as superintendence, would remain a constant amount.

There are other expenses such as power and motormen and conductors' wages, platform labor, as it is called, and repairs, which is variable, depending upon the number of car miles operated and the number of miles each one travels So it is necessary to determine the cost under these different conditions. Now the cost of the operating expenses, in our estimation, is based upon the operation of 3,280,000 car miles for the year 1922, and on 27,500,000 revenue passengers; with a return to the company, after depreciation and other operating expenses of $320,000; if the passengers per car mile as shown on page 21 of Exhibit K, would be eight passengers per car mile, the cost per passenger would be 5.43¢. If the passengers per car mile would be six passengers, the cost per passenger would be 6.32¢, in round figures 9/10ths of a cent. For a difference of two passengers per car mile or a .45¢ difference for each passenger per car mile. Now as the revenue passengers drop off and the car miles remain constant, the cost per revenue passenger increases to that extent. I gave in here the cost of the $320,000, at 280,000, 240,000 and at 200,000, and that same thing is shown on page 20 in the form of a curve or diagram which shows those points. This was given to the Commission after it had determined the return necessary with the idea that it could, by this rate table, determine the average fare required.

Q. Can you state what the number of revenue passengers per car mile was in 1922?

A. Well from recollection I think it is 7.9 revenue passengers per car mile.

Q. And can you state what it was in July, 1923, or approximately?

A. I think it is 6.7 revenue passengers per car mile for July 1923.

Q. Can you estimate from that how much more it costs per passenger in July 1923, as compared with July 1922, [fol. 621] as compared with the average for 1922.

Mr. Carmichael: The average for the year 1922, Mr. Gifford, according to Mr. Warren, was 7.9.

The Witness: That is what I said, and 6.7 for July 1923. I will correct that. The last figure that I have is for

June 1923, and that was 6.67 or approximately 6.7. That would show a difference in cost per revenue passenger under the class of service in the average of 1922, on June 1923 of .54¢ per revenue passenger.

Mr. Carman, continuing:

Q. And that was due wholly to the decrease in the number of passengers carried?

A. The decrease in the number of passengers carried and the constant or the continuing amount of car miles operated.

Q. Did this have anything to do with labor conditions or material costs or anything of that kind, in this computation that you made.

A. No. With the constant or unchanging labor price and unchanging material price, the change of the revenue passengers will make this change in costs, per revenue passenger.

The Master: How do you find car miles?

A. The company keeps a record of each car and the number of miles it operates.

The Master: That is the total number of miles that the cars are run?

A. Yes sir.

The Master: Then car miles means the total number of miles covered by the cars?

A. Yes.

The Master: Then they have the total passengers?

A. Yes.

The Master: And total costs?

A. Yes.

The Master: That is the operating cost?

A. Yes, including depreciation and return, the total costs [fol. 622] to the company, including depreciation and return.

Q. Including depreciation and return?

A. Yes. We figure, in determining, what the average fare should be. All of the costs must be considered.

Q. Then you are not estimating what the cost of service is, you are estimating what the revenue should be?

A. Yes. What the revenue should be, based on the cost.

Q. Then you divide the total revenue passengers into the total revenue?

A. Yes, and that gives you the average fare per revenue passenger.

Q. Where do you get this.

A. You divide the total number of passengers by thenu number of car miles. That gives you the revenue passengers per car mile in a constant amount of revenue passengers and increasing amount of cars operated, it decreases the revenue passengers per car mile and increases the cost, and if you have the same number of revenue passengers and decrease the number of cars operated, you decrease the number of car miles consequently; and, consequently increase the number of revenue passengers per car mile and that cost will go down, per revenue passenger.

[fol. 623] Examined by Mr. Carman:

Q. You speak of changing conditions.

A. The conditions have changed, as I testified. The average for 1922 was 7.9 revenue passengers per car mile, and the average for June, 1923 was 6.67 passengers per car mile. That shows a very radical change in conditions, and I think my estimate for 1922 was based upon 8.3 passengers per car mile, which would show some change in conditions.

Q. Then I believe you already testified that in your judgment that change was due in the main to two factors,—the six-cents fare and jitney competition.

A. I think so; yes, sir.

Mr. Carmichael: Now, wait a minute. He said "two contributing factors." I shall object to that question as read, and ask that the objection be stated before the answer.

The Witness: I should answer the question that jitney competition and the increase in fare were two leading factors in reducing the revenue passengers per car mile,—not all of the reasons, but two main reasons.

Q. Now, taking up the chart that goes with these pages.

A. I have discussed that, already, in the record.

Q. That has been discussed?

A. Yes. There is one more thing: The arrangement or form of fare could then be considered. My own opinion is that, whatever average care is determined to be proper, the frequent rider should be protected, to the extent of as low a fare as possible, to help stop competition from jitneys, and popularize the service, in addition to being economically sound and proper. That was my opinion, and still is.

Mr. Richards: Evidently the Commission thought so, and therefore made a rate of five rides for a quarter?

Mr. Carmichael: Objected to, if it is already in evidence. [fol. 624] The Witness: Apparently they felt as I did about it, because they did that thing.

Mr. Carman: We ask that pages 15 to 21 of City's Exhibit K may be marked as Commission's Exhibit A-A, and offered in evidence.

Mr. Carmichael: Objected to as incompetent, irrelevant and immaterial, based on assumptions that have been shown inconsistent.

(Exhibit AA received in evidence, subject to the objection, and exception.)

Examined by Mr. Carmichael:

Q. You are familiar with the street car system in Duluth?

A. Yes, sir; fairly so.

Q. In a general way familiar also with the length of the haul?

A. Yes.

Q. And it was testified by Mr. Warren that the average length of ride per passenger exceeds three miles.

A. I think that is so.

Q. You have noticed jitney competition in Duluth?

A. I have noticed that there is jitney competition.

Q. And that is short distance hauls, is it not, comparatively short?

A. Well, I am not in position to state that, because I have no idea of the outlying districts, and where the jitneys run to.

Q. Well, the length of the road in Duluth, from Lester Park to Morgan Park is 18.47 miles?

A. That is correct.

Q. The present rate of fare is six cents?

A. Yes, sir.

Q. Do you think it would be possible for jitneys to operate under such a rate of fare for such a distance?

A. No, sir.

Q. Do you think if the jitneys had to operate over the distance that the Street Railway does, that in any way compared with its service, that they could exist?

A. They could not.

Q. That is all.

A. That is, if you mean by a jitney--charging five cents? [fol. 625] Q. Five cents, or the same rate as the Street Railway?

A. No, they could not operate for six cents.

Q. Then when you speak of jitney competition, that is really not competition, is it, because there is no similarity of service performed?

A. Well, it is competition; it may not be competition on the same basis.

Mr. Carmichael: That is all.

[fol. 626] H. E. McWethy, sworn, testified as follows:

Examined by Mr. Carman:

Q. What is your occupation?

A. I am a street railway engineer.

Q. Where?

A. Street railway engineer and acting statistician of the Minnesota Railroad and Warehouse Commission.

Q. How long have you been in that position?

A. I have been street railway engineer for a time since January 1st, 1922, and acting statistician for approximately the last nine months.

Q. State in your own way your qualifications in the line of education and experience for the line of work in which you are now engaged.

A. I am a graduate of the University of Wisconsin engineering course of the class of 1909. From 1909 until 1911 I was an apprentice at the Westinghouse Electrical Manu-

facturing Plant at East Pittsburgh. From 1911 till 1920 I was with the Wisconsin Railroad Commission. The first two years of that time I was in the engineering department and assisted in numerous appraisals of public utility properties in the State of Wisconsin. Following those two years I was transferred to the statistical department, which is the rate making, or the rate investigating department of the Commission; and while in that department I made numerous reports to the Commission, covering analyses of testimony introduced in the various public utility hearings, and rate cases held before the Commission. From 1920 until January 1922 I was engaged in various public utility valuation work. The first case was at Nashville, Tennessee, at which point I was in charge for Ross Harris, who represented the City of Nashville, in the valuation of the Nashville Street Railway of that city. I was also with Robert M. [fol. 627] Fuestel, in the valuation of the Philadelphia Rapid Transit Company, Philadelphia, Pennsylvania, and later with W. F. Sloan in the valuation of the Bell Telephone property in the state of Mississippi. Since 1922, as I have stated, I have been with the Railroad and Warehouse Commission.

Q. And what has been your work principally during the period of your service with the Minnesota Railroad and Warehouse Commission up to this time?

A. Well when I first came with the Commission I was asked by the Commission to sit in at the hearings in connection with the Duluth Street Railway valuation, and rate analysis and report to them upon that valuation, which was introduced before the Commission at the hearings held in connection with that case. Following that work I have been doing work in connection with the St. Paul St. Railway Company, the Minneapolis Street Railway Company, and in addition to this work have had various duties having to do with steam railroads at various times. I also made a report to the Commission on the evidence submitted in the Duluth telephone case, the Northwestern Bell Telephone case, involving the Duluth Exchange.

Q. You have been here in the court room during the hearings conducted in this action, have you, Mr. McWethy?

A. I have.

Q. And you have heard the testimony of Byron T. Gifford, consulting engineer employed by the city of Duluth, given here in this proceeding?

A. I have. I have heard most of Mr. Gifford's testimony.

Q. Handing you City's Exhibit L, I will ask you if you heard Mr. Gifford's testimony in connection with that exhibit.

A. I did.

Q. That is the memorandum of comparisons made be- [fol. 628] tween the valuations of the Galveston Electric Railway and the City of Minneapolis Gas Light plant and the Southwestern Bell Telephone Company as testified to by Mr. Gifford today, was it?

A. Yes.

Q. And you collaborated with him in making that exhibit?

A. I did.

Q. State whether or not you agreed with the testimony given by Mr. Gifford concerning this exhibit?

A. I do.

Q. Did you make a study of the figures and facts, as set forth in the decisions, in the two cases mentioned, in doing this work, in collaboration with Mr. Gifford?

A. Yes. I had previously made an analysis of the Galveston and a partial analysis of the Southwestern Bell decision before collaborating with Mr. Gifford. Then we got together and agreed that these figures fairly represented, as nearly as we could determine actual comparisons, of the valuations, and principles, followed by these courts in these decisions, as applied to the Duluth Street Railway property.

Q. This exhibit, I believe, has already been offered on our part, so it needs no further offer. And you have stated that you were present at the hearings before the Minnesota Railroad and Warehouse Commission, which resulted in the order of the Commission involved in this action. Will you state whether or not substantially the same testimony was given before the Commission by the engineers, Mr. A. L. Drum, for the Company, and Mr. Gifford for the State, as has been given here in this proceeding?

A. Substantially the same testimony has been introduced in this proceeding as to the four bases of value as were introduced in the proceeding before the Commission.

[fol. 629] Q. Did you, as a part of your duties, in the service of the Commission, make an analysis and report to the Commission on the valuation of the Duluth Street Railway Company, after you had attended these hearings, and prior to the date of the Commission's order of July 13, 1922?

A. I did.

Q. I hand you paper marked for identification Commission's Exhibit BB, and ask you to state whether or not that is a copy of the report that you made for the Minnesota Railroad and Warehouse Commission and to which you referred in your last answer?

A. It is.

Q. Will you please go through that report and explain it to the Court, making such explanations as you deem proper?

Mr. Carman: We offer in evidence Plaintiff's Exhibit BB.

Mr. Carmichael: We do not wish to object to that as a whole, and we are not objecting to it as a whole, but we do not wish to subscribe to the deductions made therein, and at the present time we will make the specific objection to the report insofar as it refers to rate bases in what is known as the Burch-Pillsbury report. It refers to a prior report made by somebody back in 1910. As to that part of it I am specifically objecting, that these parties are not here in court to testify and their report, of course, could not be considered as evidence and the hearsay rule would exclude it.

Mr. Carman: In that connection, and for the record, I will state that the defendants, rely upon the City's Exhibit C, in part, as introducing the Burch and Pillsbury valuation of 1910 into this case, over the signature and admission of the complainant street railway company, and the contention made as shown in that exhibit, to the Minnesota [fol. 630] Commission. That refers to the Burch-Pillsbury valuation, being a full and correct valuation of the plaintiff's property at that time.

Mr. Carmichael: Well, for the information of the Master I would like to state that the Burch-Pillsbury report was not made by anybody in the employ of our company at all. It was no part of the company's——

Mr. Carman: And in the same connection we also rely upon the City's exhibit H an affidavit over the signature of the Secretary Reichert, of the Duluth Street Railway, in which the Burch-Pillsbury valuation was again used as a basis for the company's returns to the taxing authorities of the State, for the purposes of recording the full and true value of their property. Now, Mr. McWethy, will you please go through that report and explain it to the Court, making such explanations as you deem proper?

The Master: Is this report offered as Mr. McWethy's own conclusion of independent facts, or his deduction from the evidence?

Mr. Carman: I will let Mr. McWethy answer that question.

The Witness: That is my deduction from the evidence. I have divided my report into two sections, the first section covering the general items which were taken up at the hearings before the Commission, and the second section going into more detail and explaining my reasons for arriving at the conclusions expressed in the first section. In this report I have taken up and reported on four main headings, the first one being the fair value for rate making purposes. The second one being the rate of return. The third, the accrued depreciation on the property; and the fourth, the annual depreciation allowance. I state that no consideration of operating expenses, other than the annual accrual [fol. 631] which should be made to the depreciation reserve, has been considered in this report. We come now to the evidences of value. Table one which follows, is a comparative statement of various evidences of value of the property which has been submitted by company and City, and also shows the conclusions as to value upon the various bases as reached by the Commission's Engineer. Under Cost of Reproduction are listed the non-depreciated totals of the valuations of the four principal bases of valuation and in addition there are shown the Company's normal trend basis and the City's valuation using prices current as of January 1st, 1922. The Company's Normal Trend basis purports to establish what the valuation would be as of June 30th, 1921 had the normal upward trend of prices from 1900 to 1915 continued till 1921. This Normal Trend would show a value of physical property on June 30th, 1921, of ap-

proximately 9.8% in excess of the valuation on the 1915 basis.

Mr. Carmichael: That normal trend 1915 was 1.57 increase per year, was it not?

The Witness: Yes, as I remember it, it was. Referring again to table one, the second section of the tabulation there are listed the values showing the costs now, less depreciation, upon four different bases, and in addition there is shown the City's depreciation value, based upon prices as of January 1st, 1922. Following, the valuations are listed, book values, first: Per the Company books and second, as revised. Now this revision of the book value was the result, as I understand it, f an analysis of the Company's records from 1900 to date made by the auditor, with A. L. Drum Company, which was submitted to the Commission and to the City, I think after the hearings were closed. But it was stipulated that it should be received in evidence.

[fol. 632] The assessed valuation figures have been furnished by the City of Duluth. The Burch and Pillsbury appraisal of the property as of May 1st, 1910 was submitted as evidence of value by the City of Duluth. This valuation, plus additions to property and plant as per the Company's books, gives a valuation as of December 31, 1920 of $3,231,390.87.

The Master: Is column three of table one your conclusion from a consideration of the evidence?

A. Yes.

The Master: But not your independent judgment from any examination or study of the property?

A. That is true. While I have made some examination of the property, this report is based mainly on the evidence.

The Master: Column three means what your conclusion is as to what should be found.

Mr. Carman: Let me ask for the purpose of the record, or let me state, rather, than in our view of the case, this report is competent evidence here in its entirety, for at least one reason, and that is that the Commission, whose order is attacked in this proceeding, has the right to put before the Court everything that it had before it for consideration, when making its order that is now attacked. This, we contend, results from the Federal decisions, par-

ticularly from some of the rate decisions, I think, in the Bluefield case, which states that one of the things to be examined and considered by the Court is whether or not a Commission making a rate had before it and took into consideration the proper and necessary facts; and also in view of the repeated statement that in decisions of the Supreme Court of the United States, that the Court does not set itself up as a rate making body and does not under- [fol. 633] take to substitute its own judgment as to rates or the judgment of the rate making body, but does examine to see whether or not the rate making bodies have taken into account and considered the factors which ought to be taken into account and considered in arriving at the conclusion. That is the main theory upon which the defendants other than the City of Duluth are proceeding,—to get into the record and to make it appear to the Court or to show to the Court what the Commission had before it in making the order that is here attacked.

The Master: My question was directed for the purpose of understanding just what it was. I understood that that was part of the reason that you offered it, but I wanted to know just what it was.

Mr. Carmichael: If this is Mr. McWethy's summing up of the evidence, it was not evidence before the Commission.

The Witness: I would like to amend my answer to the question by saying that this is the combined result of my checking over the evidence submitted to the Commission, and my study of the records submitted and applying my knowledge of values, and valuations, gained in my experience with the Wisconsin Commission, and in other places, to this problem.

Mr. Carmichael: What you did, Mr. McWethy, was to reach an independent conclusion, based on the inventory that had been furnished. That is just about what you did, was it?

A. Yes.

Mr. Carman:

Q. And will you state whether or not this report was made by you to the Commission at the Commission's request?

A. It was.

Q. And whether or not it was made in the line of your duty as an employe of the Commission?

[fol. 634] A. It was. Fair value for rate making purposes. After carefully considering all of the evidence relating to the value of the Duluth Street Railway Company—Duluth Division, I am of the opinion that a fair value for rate making purposes as of June 30th, 1921 was $4,550,000.00. This figure is based largely upon consideration of the cost new less depreciation values, four bases, as determined by my analysis. In this figure I have endeavored to give what my judgment dictates is the proper weighting of the four bases of valuation. The result which I have arrived at may be computed approximately as follows: Basis No. 1, 1915 prices, $4,082,542, multiplied by a multiplier of 4, gives $16,330,168. Similarly the figures for basis No. 2 have been weighted by the factor of 4. Basis No. 3 has been weighted by the factor 1, and basis No. 4 by the factor 8. Dividing the total in the last column, of $77,289,318 by the sum of the Multipliers, of 17, gives a weighted average of $4,546,430. Now this figure is not the only computation which I made to determine the fair value. I made numerous computations, but in order that the Commission might have before it how my result compared with the depreciated values on the four bases, I set up for them in this way. Rate of Return. The Company claims that it should have a rate of return of not less than 8% upon the fair value of its property, and in addition sets up as part of its valuation a cost of financing equal to 5% of all physical property, including general overheads and working capital. The item cost of financing is discussed in Section 2 of this report. I have not made allowance in my valuation analysis for this item, believing that it is one properly to be considered as a part of the rate of return.

[fol. 635] It is a matter of record in this case that the bond discount on the sale of $500,000 of first mortgage gold bonds sold from 1901 to 1904 was $750; that the discount on $1,232,000 of general mortgage 5% gold bonds sold from 1910 to date was $99,775. No record is available as to the discount on the $2,000,000 of first mortgage bonds issued at the time of reorganization in 1900, and it is probable that they were sold at a very small discount. It is the City's position, therefore, that the total actual cost

in bond discount to the Company has been $100,525, which is $99.775 less plus $750, which amount, related to $3,732,000, the total bonds issued for 1900 to date, give an average discount of 2.7%. Since those bonds mature in 1930 and since the greater proportion of the discount has actually been paid in the past ten years, the City allows fifteen years as the average number of years over which to spread the 2.7% bond discount, resulting in an average per year of .18 of one per cent. The City concludes therefore that the average cost to the Company of capital secured through the issuance of bonds, is 5% plus, 18/100 of one per cent, or 5.18%. As applied to the Duluth Division the City makes the following set-up of the rate of return necessary for the Company; Bond interest on $2,516,890 at 5.18%, $130,374.90. Capital stock, $1,200,000 at 10%, $120,000, making a total necessary for return of $250,374.90, this amounts to a .75% return upon the total value of the stock and bonds outstanding. If the capital stock dividend be placed at 8% instead of 10%, the resulting cost of capital is 6.1%. The Company through expert witnesses makes a strong plea for not less than an 8% return upon the fair value of the property, claiming that not less than such a return will enable it to secure funds with which to finance [fol. 636] its extensions and replacements. It sets forth that at the present time it is unable to finance further extensions to its property by the sale of additional bonds, for the reason that its agreement with its Trustee provides that no additional bonds can be issued unless or until the net earnings for twelve of the thirteen preceding months are twice the amount of the bond interest requirements and that at the present time earnings are such as will not permit the issuance of aditional bonds under the above requirements. A reasonable rate of return for any class of growing investment may be defined as such a rate as will attract sufficient capital to the investment as will care for needed improvements and extensions to property. The element of risk is an important one. During the last few years the period of the war, the public in general has appeared to lose confidence in street railway investments with the result that street railway securities have sold at unprecedented low prices. This has been due not only to the lack of confidence of the public in the street railway as a

safe and sound investment, but also to the fact that it has been possible for the public to invest in other securities of perhaps equal risk at a considerably higher rate of return than that afforded by the average street railway company. If the street railway company is to survive in the competitive market for funds, it must pay that rate of interest on its securities which will attract the investing public. This rate is not a stable one. It fluctuates with the demand for money in all classes of investment and with the public's opinion of the risk incident to the street railway investment as compared with other investments. At the present time it seems evident, from the fact that the cost of money is decreasing as evidenced in general by the upward trend of stocks and bonds values, that the rate of re- [fol. 637] turn necessary for a street railway utility is somewhat lower than it was six months ago when the stock and bond market reached the lowest point in its decline.

Mr. Carmichael: Right at that point, the stock and bond market is up again, isn't it?

A. Yes.

Mr. Carmichael: The statement there contained does not reflect the new present conditions.

Mr. Richards: That is objected to as incompetent, irrelevant and immaterial, having no relation to the facts, existing at the time this order of the Commission now attached was made.

Mr. Carman:

Q. This report was submitted on March 27, 1922, was it not?

A. It was.

Q. The date to which you have referred, the time you refer to as "now" in the report was of that date?

A. It was.

Mr. Carmichael: My question was directed to the statement at the top of page six,—it is true on this day of August, 1922?

The Witness: There has been some upward trend in the value of stocks and bonds since this report was made. Taking all of the evidence as to rate of return into consideration, including the actual cost computations as sub

mitted by the City, and the fact that no allowance has been made in my valuation for cost of financing, it is my opinion that a fair rate of return upon the property of the Duluth Street Railway Company is 7½%. 7½% computed upon a fair value of $4,550,00- would result in net earnings requirements of $341,250. $341,250 would amount to a return of 7.07% on the investment cost of $4,830,322 and to 7.12% on the revised book value of $4,790,301.62. The next section is depreciation. The Company and City are agreed upon an [fol. 638] estimated life of thirty years of the property of the Duluth Street Railway Company. On a straight line basis, and eliminating consideration of the fact that certain items of depreciation are undoubtedly charged directly into operating expense instead of the depreciation reserve, this would give 3 1/3% as the annual portion of the investment in depreciable property which should be set aside for depreciation requirements. It should be borne in mind, however, that in arriving at the total accrued depreciation on the property, neither Company nor City has followed the straight line basis. The property has a weighted average age of ten years, so that on a straight line basis of depreciation its condition per cent, eliminating consideration of scrap value, would be 66 2/3%. The City finds that 83.5% is the average condition of the property and the Company arrives at 86%. It is my conclusion that the condition of the property is approximately 81.12%, taking into consideration the claims of both City and Company that there is at the present time a considerable amount of deferred depreciation and maintenance on the property. A condition of 81.12% on this property, which has an age of ten years and an estimated life of thirty years shows that depreciation is taking place, not on a straight line basis, but very closely upon a 4% sinking fund basis. It is my contention that since the property is not actually depreciating on a straight line basis it is not necessary to set up the depreciation reserve on a straight line basis. A smaller amount may be set aside each year, which with interest accruals thereto over the period of the life of the property, will return to the investor the full original cost of his property. It is my opinion that 2.3% upon the depreciable property is a reasonable annual allowance for

depreciation on the property of the Duluth Street Railway Company. This percentage corresponds to a thirty year [fol. 639] life on about a 2½% sinking fund basis, that is, this annual depreciation allowance is assumed to earn 2½% annually to return to the investor the original cost of his property at the end of a thirty year life. Applying 2.3% to the investment in depreciable property as set forth in Table 7 of Section 2, $3,971,535 gives $91,345.30 as the annual requirements for depreciation on the property as of June 30, 1921. The City claims that $68,000 per year is adequate for depreciation, and the Company sets up $134,303.87. The City's figure- are based on the assumption that the depreciation reserve will earn 4% which will be credited to the reserve throughout the life of the property. We should not lose sight of the fact that if we allow the company to earn a fair return upon a valuation which essentially is based upon the depreciated condition of the property, we automatically assume that the Company is itself entitled to all earnings upon the depreciation reserve and we would on this basis be justified in setting up the reserve only on a straight line basis. Offsetting this, however, is the fact that the fair value established in this case is not based upon the depreciated value of the property alone. It is the result of the consideration of all values. And, it must be kept in mind, too, that the depreciated value of the property includes going value or developmental costs, the earnings on which offset to a large extent the loss of earnings to the Company on the depreciation reserve where that reserve is set upon the sinking fund basis. Another consideration in making annual allowance for depreciation lies in the actual needs for depreciation as reflected by the Company's total annual charges to the depreciation reserve and the rate of building up the present reserve. Table 2 shows the historical set up of the Company's depreciation reserve. A comparison [fol. 640] of the total annual charges to the reserve to the corresponding book values by years shows that from 1909 to 1916 1.41% of the book value was needed for depreciation, and that from 1917 to 1920, .312%, the average for the whole period being 1.05%. The ratio of the 1914 book value to the 1921 book value is 89%. The ratio of the 1914 to the 1921 balance in the depreciation reserve is 31.7%.

The depreciation reserve balance on December 31, 1921 was just under $973,000. Comparison of the above percentages shows that the balance in the depreciation reserve has been accumulated at much higher rate than the increase in the book value. In other words, while the depreciation reserve at the present time is not greatly in excess of requirements, the rate at which this reserve has been accumulated during the later years of the Company's existence has been in excess of the actual requirements. Taking all of these facts into consideration, it is my judgment that the Company's requirements for depreciation in the future will be met by an annual charge of 2.3% of the depreciable property. This allowance gives consideration to the fact that a certain portion of what might be called depreciation, is, under the accounting procedure as followed by the company, charged to operating expenses direct. I now come to Section 2 of my report. It will be the purpose of this report to analyze the valuations of the Duluth Street Railway Company property as presented by the Company and the City of Duluth at various hearings which have been held before the Railroad and Warehouse Commission. Complying with the Commission's request, valuations were submitted by both the Company and City on four bases, as follows:

Basis No. 1: Prewar costs, Estimated cost of reproducing the property as of July 1st, 1921, using current prices for the year 1915.

Basis No. 2: Ten-year average cost, Estimated cost of reproducing the property as of July 1st, 1921, with aver-
[fol. 641] age prices 1912-1921.

Basis No. 3: Present day cost. Estimated cost of reproducing the property as of July 1st, 1921, using current prices as of June, 1921.

Basis No. 4: Original cost. Estimated cost of reproducing the property as of July 1st, 1921, using prices in effect when the property was installed or purchased.

As a fifth basis, the City submitted a valuation based upon prices as of January 1, 1922 and the company has submitted a valuation based upon what it chooses to call a normal trend, 1900-1921. Both Company and City give estimates of accrued depreciation on property. These valuations are set forth in tables 1 to 4 following. These tables also show, in addition to the Company's and the City's

valuation, what my deductions are as to the proper values to be used for each of the four bases. I will pass now to a discussion of the values at the bottom of page six of section 2 in my report. Tables 1 to 4 are detailed comparisons of the Company and City valuations on the four different bases and also show the conclusions which the Commission's Engineer has reached after a detailed study of all the evidence submitted in connection with the valuations by both the Company and City. It will be noted that on the first line of each of these tables is entered the amount upon which both Company and City are agreed. It is my belief that the figures, which I have entered here on the first line of each of these tables, are identical with the company's Exhibit No. 32, showing the comparison with the Gifford and Drum appraisals.

The Master: Well now Mr. McWethy referring to the matter on page 7, in section 2 of your report, you state that in the inventory there was included $15,522, for costs of [fol. 642] taking out the old track?

A. Yes.

The Master: And was there any change in that in the other bases, that item does not appear separately in the inventory, does it?

A. No, it does not.

The Master: Was it carried at $15,522, in each column?

A. The company and the City were asked by me to submit an estimate as to what costs had been included in their valuations, to cover this item, and it was finally determined that $15,522 was the cost which had been included in the valuation, for the value of the old track.

The Master: In column 4?

A. In column 3 on each of the bases.

The Master: That is, that same thing is carried as a constant amount on each of the tables?

A. No. That was found to be $15,522 on basis No. 4. On basis No. 1 it was found to be $14,611. On basis No. 2 it was found to be $20,339, and on basis No. 3 it was found to be $30,147.

The Master: Now that statement, is it of your own knowledge from your examination of these accounts?

A. In connection with the betterment of the tracks?

The Master: Yes.

A. My knowledge of the Inter State Commerce classification leads me to believe that were the Inter State Commerce classification of accounts followed strictly, the cost of abandoning old track or old property should be charged to operating expense.

The Master: That is not what I mean. I am referring to the amount, from your examination of these accounts, you are able to state that that was the amount included in each [fol. 643] basis given here?

A. I am able to state that that is the correct amount which is being included in the valuation.

The Master: Carried into basis No. 1 as $14,611 and the other bases, the amounts as you have given them for the cost of abandoning the track?

A. Yes. We next come to the item of land. The first item upon which the Company and City are not in agreement is the item of land. The City claims a valuation of $118,094, and the Company $150,735. Neither City nor Company has made an apportionment of this item between the Superior and Duluth divisions. By that I mean all of the land located in Duluth was valued by the realtor, or by the real estate men and introduced as the value for land for the Duluth division. It would seem that lots No. 422-432 of Block #47, Duluth proper—2nd division, should be apportioned between the two cities since the buildings located on these parcels of land are jointly used by Superior and Duluth and have been apportioned by the Company and City engineers. On the basis of the Company valuation, approximately $7,100 would be apportionable to Superior, and on the basis of the City's valuation, approximately $6,024 would be apportionable to Superior. After giving consideration to this apportionment which leaves $143,635 as the Company's valuation and $112,070 as the City's valuation, and also taking into consideration all of the testimony which has been submitted in the valuations by both Company and City, I am of the opinion that $128,000 represents the fair value of land for the purposes of this valuation. Material and Supplies. This item was agreed upon by the Company and City and is placed at $105,787. Expenditures not apparent in inventory. The Company has included an item of $6,385 for expenditures not apparent in inventory. This item as detailed in the

[fol. 644] Company's valuation consists of book value of various small items of construction, but which have not been included in the inventory. The items relate mainly to the construction of side-walks, grading assessments, sewer assessments, etc. The City has contended that the item is a part of omissions and contingencies and should not be included in the valuation as a separate item. I am in agreement with the Company as to the inclusion of this item. A perusal of detail which goes to make up this total shows that the elements in the main are capable of being inventoried and that the Company has preferred to use the book value of these elements rather than substitute therefor an estimated value. General overhead. The general overhead, as used by both the City and the Company are the following: First, engineering and superintendence. Second, administration, organization and legal expense. Third, Taxes during construction. Fourth, interest during construction. In addition to the overheads listed above, the following overhead items have been included by Company and City directly in the unit costs as applied to the inventory: First, storeroom and material yard expense. Second, construction tools. Third, loss and waste. Fourth, special supervision. Fifth, ommissions and contingencies. These direct overheads combined make an addition to the bare material and labor costs of 7.31%. Company and City are agreed as to the inclusion of these items. The Company and City are not agreed as to the amounts to be included for the General Overhead items, the Company making estimates for each item separately and the City making an estimate covering the total of these items, purporting to follow the Railroad Commission of Wisconsin method. I first take up the Company method, determining [fol. 645] general overheads. Under this, engineering and superintendence. This item is estimated at 5% of the physical property cost. The next I come to is the legal expense based upon the hypothetical organization necessary to reproduce the property and assume that the organization will be able to construct the property during a construction period of two years. In addition to the organization necessary to cover actual construction work, an organization is hypothesized to cover six months' preliminary work incident to organization, etc. Added to these two items are the

estimated costs of incorporation and other fees including estimated costs incident to the issuances of bonds. Taxes during construction are estimated by the Company at $50,-454 and are the taxes paid for 1915, that item being the amount of taxes during construction which is estimated by the company for the basis No. 4 the investment basis. Interest during construction, computed at 8% of the total of the physical property, including general overheads, up to this point. The City's method as stated previously has been to follow the Wisconsin Commission's procedure, in which it has allowed, in numerous cases, an amount approximating 15%. The City points out that a considerable portion of the Wisconsin Commission's general overheads have already been included in the 7.31% agreed to for direct overheads, and because of the fact, concludes, after a series of computations, that the Wisconsin Commission's method would add 10.25% on the investment basis and 1915 bases, instead of 15%, and on the present day bases, the 10.25% has been arbitrarily increased to 11.25% and 14% respectively, to make allowance for higher interest during construction and tax rates and higher administration expense. I have made an analysis of general overheads also, based largely on the Wisconsin method. The net result of my analysis indicate- that in addition to 7.31% [fol. 646] already included as direct overhead, the amount to be included on the investment, which is basis No. 4 and the 1915 basis, is 13.3%. That on the ten year average basis it should be 14%, on the present day basis—that is the 1921 basis, 16½%, it being necessary to make greater allowances for legal and administration expense, and taxes and interest during construction on these latter bases.

Mr. Carmichael: The Commission used 14% in its order, for general overloads?

A. It did.

Mr. Carmichael: And if you were giving consideration to present day prices, in your opinion that should be increased to 16.5% assuming the present day prices would be followed?

Mr. Richards: Well, this present day basis had reference to the date of your report.

A. 1921.

Mr. Carmichael: Well, would it be the same in 1923?

Mr. Richards: That is objected to on the ground that it relates to a state of facts, not in evidence, no fact on the question of valuation which was before the Commission for consideration.

Mr. Carmichael: I will withdraw my question. We will get along faster.

The Master: I don't understand whether this present statement here is your judgment, which you used, which you say is in addition to the 7.31% agreed to as direct overhead,—whether that means that they should be added to the reproduction cost as found both these percentages?

A. No, I don't mean to convey that impression. There has always been considered in unit cost 7.31.

The Master: Well that amount you have described as [fol. 647] direct overhead is in this unit price or the total.

A. They are in the figures, agreed to between Mr. Drum and Mr. Gifford. The next item is working capital. The Company's method of working capital determination is based upon an allowance of sufficient funds to provide for one-half months' current operating expenses and six months' capital expenditure. It takes the year 1920 as its base and the computation is as follows: $54,536.48 as the operating expense portion, and $32,775.27 as the capital expenditure portion, making a total of $87,311.75. The City estimates working capital at $24,213.00. It should be borne in mind that a street railway company is essentially a "pay-in-advance" utility and that requirements for working capital are not as great as for utilities in which payment for service is made during the month following the rendering of service, such as a gas or electric light utility. It is also recognized, however, that some allowance for working capital is reasonable above the amount of materials and supplies necessary to conduct the business. It is my opinion that the amount of cash actually on hand is one element to be considered in the determination of the necessary amount. The average of cash on hand December 31 for the Duluth Street Railway Company for the six-year period 1916 to 1921, inclusive, has been $33,648.63.

Mr. Richards: That is based upon an actual investigation of Company's past reports by you and stated of your own knowledge?

A. Yes sir.

Mr. Carmichael: That is just the average on that date,

A. It is the average for the six year period ending with that date, yes. Taking this and other elements into consideration, I have placed working capital at $30,000 which [fol. 648] I deemed just and reasonable for the purposes of this valuation.

The Master: Now this $33,648.63 is that the average daily balance for the six-year period ending December 31?

A. No, it is not.

The Master: The average balance found on December 31 on each of those six years?

A. That is the end of December 1921.

The Master: You don't know the average daily balance?

A. I do not. Cost of financing. I have already discussed the cost of financing, in part, and I have reached the conclusion in my report that there is a such a cost which should be considered in the rate of return and allowance made therefor in the rate of return. Developmental cost or going value. The Company includes the following items in its estimate of development cost. Expenditures for obsolete equipment——

The Master: I would not read all those.

The Witness: No, they are on page 14, Section 2. Each of the items, expense for obsolete equipment and construction are itemized in considerable detail and the testimony shows that a large part of the cost of equipment listed has been taken from the company records. Each of the items of expenditures for obsolete equipment and construction is itemized in considerable detail and testimony shows that a large part of the costs of the equipment listed has been taken from company records. The items of Cost to Unify System and Loss of Interest during operation are largely matters of estimate. The City has estimated going value at $400,000——

Mr. Richards: Now Mr. McWethy, do you not remember, as an actual fact, that the City, at the hearing, had especially reserved any consent to that and that it was understood by the Commission sitting that it was not to be [fol. 649] considered as the consent statement or agreed amount?

A. I think you are right, Mr. Richards. My conclusions here covered mainly the valuations as submitted by the engineers.

Mr. Richards: Yes.

The Witness: And the City's engineer estimated $400,000 as the going value.

Mr. Richards: That appeared in all the four bases?

A. Yes.

Mr. Richards: I just wanted the record to show that.

The Witness: It is apparent that the company seeks to include in its valuation the full cost of all property superseded during what it terms the developmental period (1882-1907), plus its estimated cost to unify the system, plus estimated loss of interest during operation. This method of dealing with the subject does not recognize that part or all of these costs may have been returned to the Company through earnings, nor does it give consideration to the fact that during this period the Company had recourse, through the proper governmental agencies, to adjust its rates to make them adequate to cover the full cost of the service, including the setting up of a proper depreciation reserve to care for superseded property. There may be some question, some legal question, as to the correctness of that statement. It appears that the company after that, or during this period, has been operating under franchise from the City of Duluth, and I presume its position is that it could not change that franchise. However, I feel that the statement is true to a certain extent, that they were working under governmental regulation of some type, which was assumed to be just; and I believe that if their earnings were not sufficient to cover an adequate depreciation reserve, they [fol. 650] *they* have recourse to whatever governmental agencies had jurisdiction over them, to have their rates increased and thus get a rate of return proper to include expenditures for obsolete equipment.

Mr. Carmichael: In other words, Mr. McWethy, the accuracy of that statement there depends on the ability either to have had the City Council, or the voters of Duluth, agree to some rate of fare, and advance the five cent rate to cover the matters that you have stated here.

Mr. Richards: That is also a legal conclusion.

The Witness: I presume that is true, Mr. Carmichael.

Mr. Carman: Let me ask, if the inability of the Company to get a rate above five cents at that time was due to its own voluntary contract in existence here, your conclusion

would be the same, that the obsolete property and property abandoned could not be had in any rate base now and charged against the property.

The Witness: Well I am not a lawyer but it would appear to me that what you have set forth is correct. It would seem that in general the positions of the highest courts with regard to going value are that such an amount should be allowed for the item as will cover the reasonable cost of developing the property during the earlier years of its existence, it being admitted that practically every public utility venture will show losses during its earlier years. It is with the idea in mind of showing the actual losses incurred by the Duluth Street Railway Company, that tables 5 and 6 have been prepared. Table 5 compares the actual amounts available for return by years, from 1890 to 1920 inclusive, with a 7% return upon the book value plus working capital. Table 6 assumes an average depreciated condition of the property of 87% over its whole life, shows that a 7% return [fol. 651] would be on the depreciated value of the property plus working capital and compares this return with the actual amount available for return after a reasonable allowance is made each year as a set up for depreciation reserve. Table 5 shows an accumulated deficit for the ten year period 1890 to 1899 of $669,171.71. Were the return placed at 6½% instead of 7%, the deficit for this period would be $569,564.20. This table further shows that the accumulated deficit for the thirty-one year period 1890 to 1920 inclusive is $950,579.76. On the basis of a 6½% return, this deficit would be $434,515.76. Taking the above data into consideration and all other evidence which has been submitted by Company and City on the subject of development cost and going value, it is my opinion that $500,000 is a just and reasonable allowance for this item. This amounts to 11.28% on the investment in the property up to this point.

Examined by Mr. Richards: Now, just a moment Mr. McWethy, that seems to place that recommendation of $500,000 solely upon the reasoning herein stated.

A. I would not say so, Mr. Richards, I have used this reasoning as a guide. I have used these tables as a guide, with the idea in mind that the losses expressed therein were in some measure what the normal loss any street railway

company would experience were it to start in operation at the present time or at any time. It would be the normal loss developed in accumulating sufficient patronage to pay a reasonable return upon its investment. In addition to that, I included in my estimate for a going value what I considered to be a normal cost of developing an efficient operating organization, attaching the business to the property. I think all of those elements were placed in evidence [fol. 652] before the Commission, and were certainly given consideration by me in fixing this going value of $500,000.

Q. It seems to me to capitalize that amount in an attempt to make up for a certain amount of accumulated deficit for the whole period.

A. You will notice, Mr. Richards, that I have not used in any instance the full accumulated deficit.

Q. No you have not done that, but when you recommend a stated sum, in considering the increased rate of return, which will be fixed by the order of the Commission, you are going a long way to produce that actual result, making up that total cost deficit.

A. I think I can answer your question in this way. This was the only item that I could make any figures on and submit them to the Commission. That is, any definite figures. I have not figured out mathematically what the cost of building up an efficient operating organization of this company was, nor could I figure out mathematically what the cost of attaching the business of this property to this company was. But I could set up those tables of losses and perhaps, because these tables appear in my report, they appear to be given a consideration which is far in excess of the consideration which I actually did give to them.

Q. Do you agree with Mr. Gifford's statement that there was no formula or rule of thumb whereby you can determine that question?

A. I do.

Q. That that is a matter that sometimes appears to be arbitrary because there is apparent lack of any specific reason or possibly any figures that underlie it.

A. That is true.

Q. And yet it does appear here in this study that you [fol. 653] were in a measure inserting the table of pure obsolescence in the values presented by the company. That

must appear to be so. There is no other amount presented by the company in there in the four bases, except that one which must be $1,129,000, which is called developmental costs?

A. Of course I did not dream that it was necessary that I should confine my estimates as to going value strictly to the evidence which was submitted. As a matter of fact I did not. I used my own judgment as to what I thought the going value should be.

Q. That would seem to be apparent from the fact that you used a total deficit for all these years of $950,000, when the company is claiming a developmental cost on basis of $1,129,000,—but, you had before you no specific figure, I think you have stated, showing the advertising costs or showing what the normal, usual, customary cost would be after the full plant had been constructed and ready for operation until it began to earn money or carry itself as a going concern.

A. No I had no such figures.

Examined by the Master:

Q. Do these tables, beginning with page 5 to page 17 contain the entire capital expenditure of the company, both for property that is now in existence and property which has become obsolescent or disappeared.

A. It is my opinion that these figures in column three represent the book value of the company as of December 31 of each of the years shown in the first column.

Q. Well in that book value has there been charged off from time to time property which became obsolescent, or does that include all the property?

A. No, there has been charged off, since 1909, when they [fol. 654] began to set up their depreciation reserve——

The Master: This runs from 1889?

A. Yes, 1899.

Mr. Richards: 1899,—it is a mistake.

The Witness: It should be '89, the first figures in table six on page 18 should be 1889.

Mr. Richards: But on page 17——

A. That should be 1889, too. This book value comprises the total additions by years, less the amounts charged to

the depreciation reserve and credited to the capital account for properties which went out of existence during this period. Does that answer the question?

The Master: Yes it does to a slight extent, but if you were to determine whether the company had actually sustained a loss from its investment, you would have to take into consideration not only the dividends or profits earned, the amount of property existing and charged off to obsolescence, the depreciation in the property and the appreciation in the value of its personal property by applying present prices——

The Witness: Of course this table purports to show the losses which the company has sustained on its book value. In so far as the book value differs from the value of the present day, or as of any other day, this would not reflect the deficit which would result from the application of a fair value of the property at the end of each of these years.

The Master: And it does not reflect the amount of property that has been used up in the service, if I may express it that way.

A. This does reflect the amount of property which was used up in the service and more than that,—the net earnings.

The Master: How does it show the amount of property used up in the service?

A. The net earnings which I have used here are the net [fol. 655] earnings less the renewal expenditures.

Mr. Gifford: And in addition, there was approximately $970,000 set up for depreciation?

The Witness: Yes, for depreciation reserve.

The Master: Take table 5, total invested capital, does that mean just what it says, that it is the total amount invested?

A. That is the total invested capital as shown on the company's books and includes the cash on hand and materials and supplies as working capital.

Mr. Richards: That is the sixth column, table 5?

A. Yes.

The Master: The date is the first column?

A. Yes.

The Master: Then it is the sixth column.

The Witness: Now the seventh column is this: It is the operating revenues, less the operating expenses, eliminating depreciation, but substituting for depreciation the actual renewal expenditures experienced by the Company in those years.

The Master: By renewal you don't mean maintenance, you mean renewals?

A. I mean renewals,—the amounts charged to depreciation reserve; during each year the company charges to operating expenses and credits to its depreciation reserve, a certain sum. In 1921 it was $135,000. During that year it charged to depreciation reserve a certain amount for retirement, took out of depreciation reserve, in other words, a certain amount for retirement, and this seventh column substitutes for retirement in the operating expenses, for the amount which the company set up for depreciation; so that the deficits here as shown more nearly represents the actual deficit which the company has experienced. There is a slight discrepancy there between the book value of December 31, 1920, shown in table five and in table [fol. 656] six, the second table of section one that I am not able to explain. Now the cost of the power contract. Now the cost of power contract. The Company includes as the cost of power contract the original cost less salvage of the power plant, which was abandoned in 1915, plus interest on salvage, insurance, and taxes paid thereon from 1907, the date power was initially furnished by the Great Northern Power Company under the contract, to 1915, the date it was found that the power plant could be abandoned,—that is, was no longer necessary as a stand-by plant. The total amount claimed as the cost of power contract is $379,542.00. The position of the City with regard to this item is that whatever element of value may be ascribed to the power contract is included in its lump sum allowance for going value. A perusal of the power contract shows that it was entered into on April 30th, 1903. In 1914 various provisions of the contract were extended and were to be effective until November 17th, 1931. The features of this contract with which we are most concerned are, first, in the provision of a rate of one cent per kilowatt hour for all current consumed by the railway company, and, second,

that the railway company has first call on the power company's output at all times. The Company has submitted a statement showing the estimated saving per year under the power contract as compared with what the cost would be were the railway company to generate its own power by steam. This estimate shows a saving of .589 cents per kilowatt hour on the basis of 1921 costs which, applied to the 1921 consumption of 10,983,259 kilowatt hours, gives a net saving of $64,691.64. On the basis of the 1920 consumption, the saving would be $81,954.

The Master: That is per annum?

A. Per annum, yes, not capitalized.

[fol. 657] Because of this saving, the company urges that it is entitled to a reward for its business foresight in securing so advantageous a contract, and measures this reward by the original cost, less scrap, of the power plant which was abandoned in 1915, plus the interest on salvage, insurance and taxes paid from 1907, the date power was first furnished under the contract, to 1915, the date of abandonment. Just what consideration should be given to the company's claim for cost of power contract is difficult of determination. It is to be expected that a public utility management will use good judgment in the conduct of its business; that it will take advantage of all economies and savings which can be effected, not only in the matters of efficient handling of cars or of efficiently carrying out a program of maintenance and the operation of its roadway and equipment, but also in the matter of affecting all possible economies in the production or purchase of power. When the time comes that through the development of natural resources, waterpower, it becomes evident that it is more economical to scrap old power plants and purchase hydro-electrically generated power, it is to be expected that an efficient management will take advantage of the situation. If we were to grant substantial allowances for the cost of, power contract, that is, for the business foresight which brought about a low cost of power, might we not with equal right penalize the Company for possible error in judgment in the making of unprofitable extensions to the system, for instance, the Park extension? It is not my purpose to contend that this Company has made grievous errors in management, but it would indeed be a man-

agement apart from the ordinary which has not made errors in judgment, costing the company, and in turn the patrons, considerable sums of money. These errors are [fol. 658] not brought to our attention. The Company's claim for cost-of-power contract includes the total sacrifice incident to the abandoned power plant, its original cost less scrap realized from sale, interest on scrap value from 1907 and 1916, and taxes and insurance on power plant from 1907 to 1916. Just why interest is included on the scrap value and not on the full value of the plant from 1907 to 1916, is not apparent from the testimony. It would seem that some recognition should have been given by the Company, in it cost and analysis, to the condition per cent of the power plant at the time of its abandonment. It would seem that whatever accrued depreciation existed on the power plant in 1907 should have been provided for out of earnings previous to that time and that the only amount which the public could be expected to pay for as an extra would be the cost of the plant less depreciation. As of May 1st, 1909, Burch and Pillsbury found the condition of the power plant to be 25%. If the condition in 1907 was 40%, the cost less depreciation would be $148,775.93. Deducting from this figure the actual salvage realized from the sale of the property, $38,977.54, leaves $109,798.39 as the estimated actual sacrifice which was made by the Company incident to the abandonment of the power plant. It is my opinion that the power contract has a value which should be given some consideration in this valuation. It appears to me that the saving which this contract makes to the street car patrons of between $60,000.00 and $80,000.00 per year should be recognized as having a value. I have included $95,000.00 as my estimate of the portion of the value of this contract upon which the street car patron should pay a return. It is my opinion that whatever additional value might be considered as legitimately assignable to the street car patron, has been given adequate consideration in my consideration of the [fol. 659] development cost. I have already discussed the depreciated condition of the property, and I do not believe it is necessary to go over that. I would like to point out to the Court, however, table 8 on page 25, which is an analysis of the depreciable property, and the accrued de-

preciation as computed by Mr. Drum, Mr. Gifford and myself on each of the four different bases.

Mr. Carman: Mr. McWethy, I will ask you whether or not Commission's Exhibit BB contains your honest and best judgment and analysis as a valuation engineer, of the matters covered by it?

A. It does.

Examined by Mr. Carmichael:

Q. Mr. McWethy, all of these general overheads, were depreciated by the Commission?

A. In the Commission's decision?

Q. Yes.

A. Yes they were.

Q. In your opinion as an engineer, should all of the general overhead be depreciated, or only that portion represented by superintendence and engineering?

A. Well it is a pretty general practice that all overheads should be depreciated. The Commission has been constant in the matter of depreciating overheads, in that it has allowed the company to set up 2½% for depreciation annually on these overheads, as depreciable property?

Q. I am asking you, in your opinion, as an engineer, were you giving any consideration now to what the Commission did, if all the general overheads should be depreciated, or only that represented by engineering and superintendence?

Q. I am of the opinion that these overheads as a general proposition should be depreciated. In the long run, it makes little difference whether they are depreciated or not.

Q. Mr. McWethy, the Commission in its order found a [fol. 660] value on the power contract of $110,000, which would correspond with the $109,000 plus, which you found as the cost that the company had in it.

A. That is true.

Q. Why was that depreciated in the Commission's report?

A. I don't know that I can explain the Commission's reason for depreciating the power contract. I presume the Commission had some very good reason in mind, with the idea in mind, perhaps, that the contract would expire in 1931, and that it would, therefore, be properly considered

as depreciable property. I might also say that it is possible that the Commission had in mind giving consideration to the estimate which I made of $95,000 as being a part of the rate base when it arrived at $91,300 as the depreciable value of this contract.

Examined by Mr. Carman:

Q. Now, that we have touched that, I am reserving a question or two on that until the next question. But it fits so well here, I will ask: It is a fact, is it not, that the Commission, by making this depreciation of $18,700, deducted from the $110,000 leaving $91,300 as depreciated value, and then allowing the Company 2½% a year, for the depreciation reserve, would allow the Company in the depreciation reserve on this property, $2,282.50 per year?

A. That is true, I think.

Q. And it is a fact that if it is not depreciable property that it ought not to have any depreciation reserve at all, isn't it?

A. That is true.

Q. And it is also a fact that the Company lost by reason of that depreciation in its net return, 7½% upon $18,700, the depreciated amount of the property, or $1,402.50?

A. That is true.

Q. And that leaves, to the account of the Company in de- [fol. 661] preciation reserve, over all that it lost, a net return of 7½% on $880 more than it would have, if this property had been held out as non-depreciable property at $110,000 and no depreciation reserve allowed.

A. Yes that is true.

Q. In other words, the way this Commission has considered this property is a benefit or advantage to the Company.

The Master: Mr. McWethy, you will be here two weeks from today, we will adjourn to September 7th, at 10 o'clock in Duluth.

(Adjourned to Friday, September 7th, 10 A. M.)

Duluth, Friday, September 7—10 a. m.

[fol. 662] Pursuant to adjournment the parties met and the following proceedings were had:

H. E. McWethy recalled.

Examined by Mr. Carman:

Mr. Carman: Mr. McWethy has completed the additional exhibits which he planned to introduce and which were mentioned during his preceding testimony, and I thought perhaps the record might be better if I would take up and put these in so that it would be connected in the record with his report that has already been introduced and then let the other parties proceed with their cross-examination.

Exhibits marked Commission's Exhibits CC and DD respectively.

Mr. Carman: The exhibits that we now offer, two under one cover, except the last page, is Commission's Exhibit CC. That is, it is all related and connected together in some form in Mr. McWethy's valuation report. The last page in the cover which has been put there merely for convenience, does not have the relation to the preceding testimony that the rest of it has and has been marked Commission's Exhibit DD.

H. E. McWethy recalled.

Examined by Mr. Carman:

Q. Mr. McWethy, referring to the exhibit marked for identification as Commission's Exhibit CC, which consists of 50 numbered pages under cover, now taking up and explaining this exhibit in the same manner as you explained your valuation report in the preceding testimony.

Mr. Carmichael: Are you making an offer of it now, Mr. Carman?

Mr. Carman: Well I think I will make an offer after it is gone through with and identified.

Mr. Carmichael: Well probably there will be a lot of testimony here that is going in in this shape, then, without objection, that would be objectionable. As I understand it,

[fol. 663] this is made up to show the mental processes by which the Commission arrives at its determination, as I understand this exhibit.

Mr. Carman: This exhibit consists of three sections and is an analysis made by the witness.

Mr. Carmichael: An analysis made by the witness of what the Commission did?

Mr. Carman: Yes, and some comparisons with estimates that were before the Commission by the parties before the suit, or proceeding before the Commission.

Mr. Carmichael: Of course we have the Commission's order as to what it did. As to what its mental processes were in arriving thereat, it makes no difference.

The Master: It would make no difference unless the question as to whether the Commission acted arbitrarily or not was involved. That is one element that might enter into it.

Mr. Carman: I do not think it is possible to determine in advance the testimony of the witness. I do not think it is possible in advance to make any explanation as to how this exhibit or any section of it would be objectionable, or whether it would be of great weight, so I would proceed in the usual method and ask the witness to tell what it is and offer it in evidence.

The Master: Do you wish to make any objection to it?

Mr. Carmichael: To any testimony given in relation to Exhibit CC and also to the offer of it, when the offer is made, objection is and will be that it is incompetent, irrelevant and immaterial. I do not understand that the Commission did anything other than make its order. It made no record, according to our information, of anything that [fol. 664] this witness is about to testify to, and it is not the best evidence, if any such thing was done. As I understand it, all this purports to be is this witness' analysis of what he thinks the Commission did. We know what the Commission did. The order states what the Commission did.

The Master: The objection is noted, and exception.

Mr. Carman: You may proceed, Mr. McWethy.

The Witness: Section one of this analysis comprises the Commission's corrections to Company's 1921 statement of operating expenses. Section two comprises the Commission's further adjustments to 1921 expense statement, to

give effect to labor and material deductions for 1922, referring to sheet No. 1 in the cover. I will state in connection with Section 1 and Section 2 that the data which is presented herein was originally compared by Mr. B. W. Smith, who was formerly statistician of the Railroad and Warehouse Commission and who is now employed by the Commission. I have reviewed carefully the data which he prepared for this case, and these two sections represent my review of the data which he prepared for the Commission. In order to get an estimate of the operating expenses for 1922, among other things, the Commission considered the 1921 operating expenses of the Company with certain corrections which it made first, and these corrections are set out in Section 1 of this Exhibit. It also found that during the first part of 1922, January 16, the company put into effect a reduced wage schedule, affecting practically all departments. It was necessary therefore for the Commission, in arriving at its estimate for 1922, to take account of this reduced wage schedule. The fore part of 1922 also showed that there was a material decrease in the cost of maintenance materials, and the Commission estimated that for the year 1922 this decrease would probably continue. Therefore in its adjustment of 1921 operating expenses there was [fol. 665] a statement which also gave effect to a reduced cost of material, all of which is set forth in section 2 of this exhibit. Section 3 of this exhibit is the Commission's analysis and adjustment of the Company's 1922 statement of operating expenses,—Section 3, commencing on page 30. In Section 4 will be the Commission's analysis and adjustment of the Company's statement of operating expenses for the year ending June 30, 1923—Section 4, commencing on page 4. Now I will explain in detail section 1 of this exhibit, which as I understand, consists of the Commission's corrections to the Company's 1921 statement of operating expenses. Turning to page 3, we have a detail of the Way and Structures portion of the expenses of this year, showing by primary accounts the amounts charged here for the year 1921. Noted on this table are the accounts which the Commission increased or decreased in its corrections. These accounts are No. 12, No. 24A and No. 25. Page 4 is a continuation of the Company's 1921 statement of operating expenses showing the general accounts, equipment and

power by primary accounts. The accounts which the Commission corrected on this page are Accounts 40 and 50, depreciation only.

Q. Let me ask you at this point when you speak of the accounts that the Commission corrected, in the ordinary course were those corrections reported back to the company?

A. They were not, except insofar as the depreciation which was considered as a separate item by the Commission in its order.

Q. These pages 3 and 4 that have been spoken of, do they contain figures which were sent in by the company, except these which are noted by the start here, that are spoken of?

A. All of the figures on pages 3, 4 and 5 are Company figures. The items which I have called your attention to are only those items the Commission corrected, and the correction will be taken up in detail as I go forward in my explanation of my subject.

[fol. 666] The Master: The last column of 3, 4 and 5 contains totals of the items as reported by the Company?

A. Yes, sir.

Mr. Carmichael: Those were taken, your Honor, from our Exhibit 11, which Mr. Gifford has offered in evidence before the Commission, showing the actual status of our books for the period, in 1921.

Mr. Richards: The only adjustments, I understand are those shown by the mark star, on pages 3, 4 and 5.

The Witness: The only amounts which were adjusted are those marked with a star.

Mr. Mitchell: May I ask one question? You spoke of the Commission's correcting certain things. You do not mean by that, I take it, that there was any error or mistake in the Company's books, but the Commission, in its judgment, thought certain changes or modifications in those items should be made?

A. That is true.

Mr. Mitchell: I suppose the Master understands we do not admit that the exhibit was wrong.

The Master: That is what I understood. What I understand is the Commission took the item and modified the amount, to what it considered correct in making up its total.

Mr. Mitchell: Of course the Commission had no power to make any correction.

Mr. Carman: I think the notes at the bottom probably show that the Commission's corrections may more properly be termed adjustments to a normal basis.

Mr. Mitchell: I do not want by silence to be admitting that that is true. All that happened was, that the Commission in making its decision made certain adjustments or changes in the Company's figures.

The Master: The Commission disallowed certain claims made by the Company.

[fol. 667] Mr. Mitchell: Well that may be all right. The Commission was acting as a determining body, and that, I think, is about right. But I notice that the attitude of the Commission is, perhaps that they have a right to say how these things shall be done, how much shall be charged for depreciation and the various things, and we do not concede that at all.

Mr. Richards: The statute gives them that power specifically by Section 13, the Brooks-Coleman law, to prescribe depreciation.

Mr. Mitchell: Well they have not prescribed it so far, I am just finding a little fault with the word "correct."

The Witness: I have used the word "correction" here in the first section to separate it from the word "adjustment" which I have used in the second section—"adjustment" being used to cover mainly labor and material reduction which the Commission made in the 1921 operating expenses.

Mr. Carman: In other words, the purpose of this part of the exhibits and the showing with reference to the so-called corrections, is showing what the Commission did in its efforts to arrive at a proper rate. It does not necessarily take up the question whether a particular item was actually spent or not in a particular year. The Commission, in determining a rate of fare to be charged, is obliged to determine that upon a normal basis as near as it can arrive at that basis; and items of any particular year, which are applicable are adjusted or corrected to a normal basis, in order to get at a general basis in fixing a rate.

The Witness: I believe that is what the Commission deemed its duty in this proceeding. At page 5 it shows the detail of the general accounts, conducting, transportation, and a detail of the general and miscellaneous accounts.

[fol. 668] Also transportation for investment credit and tax assignable to railway operations. On this page, account 64, which is conductors, motormen and trainmen; Account 87, salaries and expenses of general officers; Account 89, miscellaneous general expense; Account 90, valuation expense; Account 92, injuries and damages; Account 98, Rent of equipment; Account 215, taxes assignable to railway operations,—were adjusted by the Commission.

The Master: You have no star opposite the last, account 215?

A. There should be a star there.

The Master: What is transportation for investment?

A. There are always included in street railway operating expenses certain items of power and maintenance and operation which are proper charges to construction, cost of hauling material. Page 6 shows the detail of the Commission's corrections to the general account Maintenance of Way and Structures. The total of this account, as the Company set it up, was $62,169.47. Included in this amount was an amount of $3,535.72 for removal of snow and ice, account No. 12. The Commission made adjustments in this item; it found that charges for the removal of snow and ice for the period from 1913 to 1921 inclusive, amounted on the average to $4,994.09. It estimated that a normal charge for this account would be $5,000, and included $5,000 as its corrected figure for this account, thus resulting in an increase of this account of $1,464.28. Included also in that total of general account Maintenance of Way and Structures, was an item of $2,272.91 for account No. 24A, Buildings, Fixtures and General Car Houses. This amount is the result of the Company's apportionment, the total cost for the system for this account between Superior and Duluth, upon an actual basis,—that is the expense which originated in Duluth, was charged by the Company to the [fol. 669] Duluth system. The expense which originated in Superior was charged by the Company to the Superior system. Now the Commission considered that the two amounts for Superior and Duluth should be added together and the total prorated between Superior and Duluth on the basis of the relative car miles operated in the two cities for the year 1921. The theory on which this change was made was that there was a certain amount of expense included in

this account which was a joint expense, and that there should be an adjustment made to give effect to the fact that a certain part of this was a joint expense between the Duluth and Superior divisions. The adjustment to this account, however, pro-rating on a car mile basis amounts to a revision of $308.74.

Mr. Carmichael: On this particular item isn't it a fact that the Commission was erroneous, that all this expense was encountered only on car houses in Duluth, used only for Duluth cars, there being no Superior cars maintained in Duluth at all?

A. I think I should have amplified my explanation somewhat on this, Mr. Carmichael. I think that this is the Commission's net judgment as to what should be assigned to Superior on all of the account No. 24. It includes the maintenance of general offices and other accounts, which perhaps contained more of the expense which can be considered as joint between Superior and Duluth. The total adjustment is very small, amounting to only $308.74. Page No. 7, account conducting transportation, the total of this account as set forth by the Company amounts to $554,954.58 included in the general account as account No. 64, passenger conductors, motormen and trainmen. The Commission found that the Company had erroneously charged an amount of $70.12 per month to the Superior division which should have been charged to the Duluth division, and it was the Commission's understanding that the Company admitted that this charge was in error and made a correction for the amount after July, 1921. The total adjustment on that ac- [fol. 670] count amounts to $490.84 and is an addition to Duluth operating expenses. The total, then, of the general account, conducting transportation, as corrected by the Commission, amounts to $555,445.42.

Mr. Richards: That was correcting the error of the Company itself to its disadvantage, Mr. McWethy?

A. Yes.

Mr. Carmichael: We don't admit that there were any errors at all.

Mr. Richards: Well, the Commission thought so.

Mr. Carmichael: No, the Commission didn't think so.

The Witness: At page 8, General and Miscellaneous, the Company included under the account General and Miscel-

laneous, for the year 1921, a total of $138,467.74, included in this account. Under account No. 83 salaries and expenses of general officers, was an amount of $24,338.47. Of this amount there was paid a salary of $3,600 per year for the Chairman of the Board of Directors. The Company admitted in its testimony before the Commission that the amount should be deducted by the Commission in its consideration of a fair set-up of operating expenses upon which to base rates in this case. This makes a net reduction for this account of $3,600. Included also in the total account of general and miscellaneous, is an item of $18,122.93 for account No. 89, Miscellaneous and General Expense. Of this amount $6,808.81 was for the Pulaski-Spencer audit of income-tax return and amortization of the Jaeger defalcation. The Commission considered that neither one of the amounts included therein for these items was normal expenditure, and therefore eliminated them in its set-up of operating expenses. This $6,808.81 added to the $3,600 under account No. 83, gives a total reduction of $10,408.81, and results in a net general miscellaneous account, as corrected by the Commission of $128,058.93.

[fol. 671] The Master: Before you leave that, both the amortized amounts of the Jaeger defalcation and the income tax audit were deducted?

A. Yes sir.

Mr. Carmichael: The Pulaski-Spencer audit, where you set up the item of $6,808.81, do you know that at that time the Federal Government was exacting a charge from this company of $81,000 additional income tax and that as a result of that audit, of which that $6,808.81 was a part, the company was able to get that $81,000 reduced to $4,700 as a result of that audit made at that time?

A. I did not know the figures. I knew there had been some reduction in the Company's taxes, due to representations made by the Company to the Federal Government.

Mr. Richards: Have you in mind now the specific amount that was amortized on account of the Jaeger defalcation for that year?

A. I have not, with me, Mr. Richards. Page 9, the total amount included by the Company in its 1921 statement for taxes assignable for railway operation, was $81,260.39. In-

cluded in the above tax accrual for the year 1921 are taxes on certain property owned by the Duluth Street Railway Company, located in Duluth but used jointly by the Duluth and Superior divisions. The Commission considered that the proportion of such taxes as is properly assignable to the Superior division should be excluded from the tax accruals from the Duluth division, as set up by the Company. On this theory the Commission made a computation on the tax accruals on the following items of property, all of which, except land, were apportioned by the engineers for the City and the Company between Superior and Duluth with the valuations agreed to. The items were Buildings. Under Buildings, were the general offices, paint and carpenter shop, machine and blacksmith shop, and the sprinkler sys-
[fol. 672] tem. Under shop, machinery, tools and miscellaneous equipment, there were such items of shop machinery as were in the machine shop and blacksmith shop, and foundry and carpenter shop, and track repair department and paint shop, miscellaneous equipment, railway machinery and tools. Under the heading, furniture and fixtures, there were furniture and fixtures in the general office, paint and carpenter shop, store room and the office, machine shop and blacksmith shop. All of those items it was agreed by the engineers should be apportioned between Duluth and Superior. However, the taxes as paid to the city of Duluth include taxes on all of the property located in the City of Duluth, Page 10. Another item was Land. Lots 422 to 432 of Block 47 of Duluth Proper, second division, from the Commission's computation it was determined that there was a tax accrual in 1921 charged to the Duluth division, which should be apportioned to the Superior division, amounting to $2,124.37. In addition to the above adjustment, the Federal Income tax accrual, estimated to be included in the company's total accrual, was eliminated. This amount being, as estimated $7,114.78; and adding the two items to be eliminated gives a total of $9,239.15; and which, deducted from the total amount of tax included by the company in its statement of $81,260.39 leaves $72,021.24 as the taxes allowed by the Commission. A re-computation of the taxes to be excluded from the 1921 income statement shows that the above exclusion is an error. Correction is made at a later point in this exhibit in Section 3 on pages 27 and 28.

Page 11 is a recapitulation of the Commission's increases and decreases, showing by general accounts the net amount of increase or decrease which the Commission considered should be made to the 1921 operating statement before consideration of the labor reduction and material reduction was made. Section 2, page 12, is the Commission's further adjustment of 1921 expense statement, to give effect to labor [fol. 673] and material reductions for 1923. The result of this analysis in this section constitutes the Commission's estimate of operating expenses for 1922. Page 13 is an explanatory statement. Up to this point consideration has been given only to such adjustments of the 1921 operating expenses of the company as would make them approximately normal for 1921. In the following pages further adjustments due to the decrease of labor rates, effectual January 16, 1922, and due to estimated decreases in unit costs of maintenance materials in 1922 as compared with 1921, are made, resulting in the Commission's estimate for operating expenses for operating expenses for 1922, labor reduction of possible costs in Exhibit 25 before the Commission, copy of which follows. The reduction in maintenance and material unit cost is based on the Ritchie Street Railway Maintenance Material Index published monthly by the Electric Railway Journal.

The Master: You say Exhibit 25 which follows?

A. Page 14 is a copy of the previous Exhibit 25 before the Railway and Warehouse Commission. This exhibit shows that on January 16, there was a reduction in payroll for the Duluth division on track and roadway of 8.3%; and in the mechanical department of 7.9%, in power plant, and engineering 9%. In the Duluth operating 9.3%; and in the general miscellaneous 7.6%. Now the general procedure which the Commission followed in giving effect to its labor reductions was to apportion the 1921 expense (as adjusted in section 1 of this exhibit), between labor and material, and reduce the labor and the material independently of each other. Page 15, then, is the set-up of the Commission's reduction in labor and material on the general account of Maintenance of Way and Structures. The Commission made a detailed analysis of the Company's operating expenses for the first eight months of 1921. This was done for the emergency rate case; and in arriving at its division

of the accounts for the whole year of 1921 between labor [fol. 673½] and material, it assumed the ratio of labor to material for the first eight months, on the average, would be applicable to the year. Now the total Maintenance of Way and Structures account, after adjustment by the Commission in Section 1, of this exhibit, amounted to $63,325.01. The total labor included in this account for the first eight months of 1921 amounted to $43,478.24, and the material amounted to $7,465.62. And there was a miscellaneous item, neither labor nor material, amounting to $5,918.58, making a total for the first eight months of $56,862.44. The ratio of the labor to the sum of the labor and material, show that 85.3 was labor and that 14.7 was material; thus apportioning the miscellaneous items as an overhead to the labor and material items. 85.3% of the total of this amount, $63,325.01, gives $54,016.24, as the 1921 labor. This amount was reduced by 8.3% which is the actual reduction in the track and roadway department of the Duluth division effective January 16, 1922 as shown on Company's Exhibit 25, before the Railroad and Warehouse Commission. 14.7% of the $62,169.47 equals $9,138.91.

The Master: Shouldn't that be $63,325.01?

A. No it should be $62,169.47, for the reason as shown on page 6, the adjustment which the Commission made of these accounts with reference to material and labor charges, and the material portion of this would be 14.7% of the Company's total for this account, or $62,169.47.

The Master: Well this $62,169.47, was the Company's claim for amount expended for maintenance and Way Structure in 1921?

A. Yes.

The Master: And $63,325.01, beginning at page 15——

A. That is the amount after the Commission's correction, as shown in Section No. 1 page 6 at the bottom of the page.

The Master: The Commission added to the amount [fol. 674] claimed by the Company the figures shown on the first page?

A. Yes.

The Master: Giving the normal amount $63,325.01 for maintaining the Way and Structures?

A. Yes.

The Master: Now that account is carried over at the beginning of page 15. The Commission found that there had been a reduction in the labor and material cost which should be taken from this account?

A. Yes.

The Master: Well, I don't see why that amount is not used for determining the amount of material, 14.7. When you find the total labor cost you use 85.3% of 633,325.01. Why don't you find 14% of the same amount?

A. Because the Commission considered that the adjustment which it made of this account of $1,155.54 was labor. Labor is adjusted. The material in this account remained as the Company set it up.

Mr. Carman: It leaves the figure $62,000 making the reduction in favor of the Company, rather than working against it.

The Master: No, I don't think so.

Mr. Carmichael: This page 15 is corrected to estimate of 1922?

A. It is corrected to an estimate of 1922. Page 16 shows at the top of the page a set-up of the Ritchie Street Railway Material Index number for the year 1921, and first four months of 1922. The average for 1921 was 170. The average for the first four months of 1922 was 156.5. Equating the 156.5 to 100%, and determining the present rate, 170 would be 108.62, or 8.62 degrees under 1921 average, and it will be remembered that the Commission's order was as of July 16 and was prepared sometime before this. The Commission estimated that there would be for the year 1922 a normal decrease in the unit cost of maintenance and materials of 9%.

Mr. Carmichael: The first line there, average for 1921, 170. 170 what?

A. It is 170% based on 1913 as 100%.

[fol. 675] Mr. Carmichael: Pre-war prices?

A. Yes, sir.

Q. Perhaps you will explain a little more fully what Ritchie's Street Railway Material Index Number is?

A. Ritchie's Street Railway Material Index Number is prepared by Albert S. Ritchie, who is a consulting engineer of a national reputation, and professor at Worcester Polytechnic Institute at Worcester, Massachusetts. At the end

of each month he publishes in the Electric Railway Journal a Conspectus of Indexes, showing Bradstreet and Dun's and United States Bureau of Labor wholesale commodities and retail foods, and other trends, including this trend on index of Street Railway materials, which he compiles from the data which he secures from numerous companies throughout the United States. Applying a 9% decrease to these $9,138.91 of material for 1921, results in a total for material in the Maintenance of Way account, in the Commission's estimate for 1922, of $8,316.48. This, added to the estimated labor cost for 1922 gives the total of $57,849.37 as the Commission's estimated amount for Maintenance of Way and Structures for the year 1922. Page 17, the same principle has been applied to the item Equipment Expense. The labor portion of this account has been reduced by 7.9% which is in accordance with the Company's Exhibit No. 25, before the Railroad and Warehouse Commission, and the material portion has been reduced by 9%. The net result is that the company's total for equipment for the year 1921, amounting to $111,950.77 has been reduced to $102,602.26, and this amount constitutes the Commission's estimate for this account for 1922. Page 18, the same principles are applied to the account power. Of the total of $115,134.07, which was the Company expenditure for this account in the year 1921, there was included for account No. 59A, power purchases for railway operations, $108,792.52; and for power purchased and resold, $302.70. Then under account No. 61, power transferred, credit $3,687.12 in the red, giving [fol. 676] the total cost of power for the year of $105,-408.10. This amount deducted from the total of $115,134.07 which was the Company's total for this account for the year, leaves $9,725.97, which was labor and material. The Company's exhibit 25 before the Railway and Warehouse Commission showed a decrease in this labor account of 9%, and since material reduction also was 9% the two percentages were combined and applied jointly to this $9,725.97, and resulted in a revised figure of $8,850.63, and adding that to this revised figure for labor and material, the actual cost of power to the Company in 1921 of $105,-408.1- gives the Commission's estimate for 1922 of $114,-258.73. Page 19 is an analysis of the labor and material reduction applicable to the account Conducting and Trans-

portation. This is carried out in precisely the same manner that the adjustments have been made to the other accounts. Labor has been reduced by 9.3% which is in accordance with exhibit 25, before the Railroad and Warehouse Commission; and material reduced by 9%. The account, as revised, after the labor and material reduction, amounted to $507,315.99. Page 20 is an analysis of the reduction applicable to General and Miscellaneous account. The amount of which, as corrected by the Commission for 1921, was $128,058.93. On this page we have set up a detail of the labor and material and miscellaneous, showing by primary accounts, the amount charged to the general and miscellaneous accounts for the first eights months in 1921. This shows a total to labor of approximately 43.4%, Material, 9.57%, miscellaneous, 47.04%; a total of 100%. That total of this account as adjusted by the Commission,—labor would become 43.4% of $128,858.93, which would amount to $55,577.58. This amount reduced by 7.6%, the percentage of reduction applicable to this class of labor, is as set forth in petitioner's exhibit 25 before the Commission, leaving us with labor at $51,353.68. Page 21, 9.57% of $128,058.93 gives $12,255.24, the amount of material included in the [fol. 677] Commission's corrected 1921 statement of General Miscellaneous expense. This amount reduced by 9% leaves $11,152.27 as the amount chargeable to material for 1922. The miscellaneous consisting of 47.036% of $128,058.93 amounting to $60,226.11. Included in this miscellaneous expense were valuation expenses, account No. 90, $6,752.27. The Commission considered that the total valuation expense should be amortized over 56 months. This results in a monthly charge of $951.27 or a total yearly charge for 1922 of $11,415.24. The net amount of this increase for the year 1922 as estimated over the year 1921, was $4,662.97. This change in this account was agreed to by the Company, and the amount of $11,415.24 was included by it in its actual operating expenses for 1922. Included also in the miscellaneous of $60,226.11 was $17,280.87 for injuries and dam ages. The testimony before the Commission indicated that this account is abnormally low and about $16,888.90 should be added thereto. $17,280.77 plus $16,888.98 gives a total of $34,169.85 as the Commission's revised figures for this account No. 92.

Page 22. Account No. 98, Rent of Equipment. Under this heading the Company included in this expense for the 1921 an amount of $835.88. No equipment was to be rented in 1922; hence this amount was eliminated in estimating the Commission's allowance for 1922, giving a net reduction of $835.88. The total of these adjustments results in a net increase to the general miscellaneous account of the company as adjusted by the Commission for 1921 of $20,716.07, making the total for miscellaneous portion of this account of $80,942.18. At the bottom of page 22 is shown a recapitulation of the Commission's estimate for 1922 showing labor material and miscellaneous separately, and arriving at a total of $143,448.13 as the total of the Commission's estimate in 1922 of general and miscellaneous expense account. [fol. 678] Page 23 is depreciation. In 1921 the Company set up $134,303.81. The commission found that 2½% upon the depreciable property of the company was a fair and reasonable amount to be charged to operating expenses for depreciation. 2½% of $4,600,000 amount to $115,000. In that adjustment there was in the Commission's estimate of depreciation for 1922 a decrease of $19,303.81 below that accrued by the Company.

Page 24. This is a recapitulation of the Commissions Labor and Material reductions, and other adjustments which it has made to the 1921, operating expenses, as it corrected them in section 1. This table shows the total, labor and material and other adjustments, a reduction of $67,743.53 and shows the total operating expense, including taxes, of $1,111,730.84. This amount is the Commission's estimated operating expense for 1922 and it is upon this amount or upon this figure that the Commission based its decision in the case before this Court.

Q. I notice a difference of $4 between the total decrease arrived at on page 24 and the figures stated in the Commission's order.

A. There was a $4 error in the Commission's decision in the recapitulation of the operating expenses for 1922.

Q. That accounts for this $1,111,726.84?

A. Yes.

Q. Which appears in the order—Exhibit C attached to Plaintiff's bill of complaint—A mistake in addition, was there?

A. Yes. I desire to point out in connection with this recapitulation on page 25 that all of the adjustments which the Commission had made here are reductions, except the item of general and miscellaneous expense, which was increased by $15,389.20.

The Master: These figures occur in the general and miscellaneous division?

[fol. 679] A. Yes.

Mr. Richards: What is that?

The Master: When you speak of the addition of $15,389.24, the statement is made that Mr. McWethy was called attention to a note that there were decreases in each division except in the division of general and miscellaneous. In the division of operating expense there was an increase allowed by the Commission of $15,389.20. Now, that amount seems to be stated on page 22, at $20,716.07. I want to ask you the reason for the difference.

The Witness: The statement on page 22 shows the total net decrease in the miscellaneous expense in the Commission's estimate for 1922, $20,716.07. That $20,717.07 must be taken into consideration with the decrease of $4,662.97 shown on the preceding page.

The Master: Then, that net increase does not appear on page 22?

The Witness: That net increase does not appear on page 22, but you will find the comparison of the total is shown on page 20, that total of $128,058.97 shown on page 20 at the top of the page, the difference between those two figures is $15,389.20.

Page 25. We next take up consideration of the operating revenues and expenses for 1922, as estimated by the Commission. The Commission estimated passenger revenue for 1922 at a 5¢ fare, which was based on the total of revenue passengers estimated by them of 27,030,000. In support of this figure, we may point out that in its testimony before the Railroad and Warehouse Commission the Company estimated its revenue passengers for the year 1922 to be [fol. 680] 27,200,000 and the City's estimate was 27,500,000. Before reaching a decision in this matter, the Commission had before it, unofficially, the revenue passengers for the first few months of 1922, which showed revenue passengers somewhat lower than 1921. The Commission gave

recognition to this decrease by making its estimate at a considerably lower figure than that estimated by either the Company or the City. 27,030,000 revenue passengers at 5¢ amounts to a total of $1,351,500, adding to this other railway operating revenue estimated by the Commission for the year 1922 at the 1921 figure of $14,334.10, gives a total of $1,365,834.10 total operating expenses as estimated by the Commission and shown on the recapitulation last column of page 24, amounting to $1,039,709.60. The taxes were estimated by the Commission, excluding Federal Income tax, as $72,021.24, giving a total estimated expense of $1,111,730.84 and leaving as a net available for return on the investment $254,103.26. This figure is within $4 of the amount which the Commission actually used in its decision.

Q. That is the same $4 error in computation you spoke of a moment ago?

A. It is.

Page 26. I have already mentioned that there was an error in the Commission's computation of the taxes to be eliminated on account of the property taxes in Duluth, but used jointly by the Superior and the Duluth Division. I will show on the sheets which immediately follow page 26 that the net error amounted to $4,844.50; that the tax which should have been included in this estimate should have been $76,865.74 in place of $72,021.24. In addition to this correction, the testimony now *shows* that a total of $3,179.09 should have been included by the Commission in [fol. 681] its estimate for 1922 *in its estimate for 1922*, in the matter of non-operating income. Combining this item with the error in taxes, gives a net adjustment to the Commission's estimate, estimated amount of return on the investment for 1922 and also applicable to the 1922 estimate of operating expenses of $1,665.41. Applying this adjustment to the Commission's estimate of 1922 operating expenses, amounting in total to $1,111,726.84 gives a revised estimate of $1,113,392.25.

The Master: This item of taxes you have corrected here, is that from subsequent examination that you have made of the records and books?

A. Partially. With respect to the income tax, it is; but with respect to the portion of the personal property tax

which the Commission estimated should be excluded from the Duluth Division taxes, the correction which I have made is simply a correction to the statistician's figures made by him and presented to the Commission before this order was issued. He made an error in figuring the taxes which should be eliminated.

The Master: Does this amount of $7,865.74 contain the Federal Income tax?

A. It does not.

The Master: But does it contain your judgment as to the portion of the City's taxes which should be charged to the Duluth Street Railway Company?

A. It does, for 1922, and on the immediately succeeding pages I will show you my computation.

Page 27. In these computations on pages 27 and 28, I have made an effort to correct the Commission's estimate of the proper amount to be eliminated from the personal property and real estate taxes and the Federal Income tax [fol. 682] from the operating expenses of the Duluth Street Railway Company. On page 27 I have taken up the personal property tax, the portion of the total tax paid by the Company or accrued by the Company and have made a separation of those taxes so as to eliminate the portion of the taxes on jointly used property which should be apportioned to Superior. In the left hand column under Class 3, of the tax return, is set forth those items which the Tax Commission includes in the blank which it forwards to the various companies, and upon which they make out their tax return. In column one I have set down the values agreed to on the investment basis of the property corresponding to this classifiaction, and found as shown in the third column on pages 109 and 108 of Volume 2 of Mr. Gifford's report, which is City's Exhibit J, before this Court. Now, the total value of the property located in Duluth, which falls under the class 3 item of this tax return is $229,210.36; and of this amount the engineers assigned to Duluth and agreed that $201,103.36 should be that value. On the Class 3 property the City of Duluth assessed at the rate of 33⅓%. That is, it based its value for assessment at 33⅓% of what it chooses to call its full value.

Mr. Richards: Full cash value.

The Witness: That is the proper term, is it?

Mr. Richards: Yes.

The Witness: 33⅓% of the total property located in Duluth under Class 3 would amount to $76,403.45, and on that part assigned to Duluth by the engineers, $67,304.45. Under Class 4, I have set forth likewise the values assigned by the engineers and agreed to under the various classifications as set forth in the engineers' report, which gives me a total for Class 4 of $3,207,556 as the value of [fol. 683] the property located in Duluth, and the same amou-t as the value assigned to Duluth. 40% of Class 4, which is the portion which the taxing authorities used of the full cash value in assessing the street railway property, amounts to $1,283,022.40 on both the total assigned to Duluth and the property located in Duluth. Adding to this the 33⅓% of the property in Class 3, gives the totals of $1,359,425.85 as the value of the property located in Duluth, and $1,350,056.85 as the assessed value of the property assigned to Duluth, based upon the engineers' valuation. From this we find that of the total value of the property located in Duluth, the value assigned to Duluth is 99.31%. Now the personal property tax accrual in 1921 amounted in total to $73,293.18. 99.31% of this is $72,787.46, and the difference between the two figures gives $505.75, the amount of tax which should be eliminated from the Duluth operating expenses and assigned to the Superior division.

The Master: Now is it your conclusion that 99.31% of the tax paid is paid on the real and personal property in the city of Duluth should be assigned to the Duluth division?

A. It is.

The Master: And that applies for each year?

A. Yes. Page 28, is the continuation of the tax analysis, this being the analysis of a portion of the real estate taxes paid on property located in Duluth which should be assigned to the Superior division. The total land value of the property located in Duluth, based upon the City's estimate of value as presented before the Railroad and Warehouse Commission, amounts to $118,094. Eliminating from this total——

[fol. 684] Mr. Carmichael: The Commission used a differen- value didn't it?

A. Yes. But for the purposes of this total I thought that the City's value represented more nearly the original cost

of the property and would therefore come nearer to being the assessed value of the real estate. I think it would make very little difference which value we had used. The Commission found that of the total real estate located in the City of Duluth, Lots 422 to 432 inclusive of Block 47, Second Division of Duluth proper were jointly used pieces of real estate; and on the basis of the City's value, the amount to be eliminated, as assignable to the Superior division would be something over $6,000; so that the land value as set up in column 2, $112,070, represents the value of the land located in Duluth and used by the Duluth car riders upon the City's value. Buildings were agreed to by the Company's and the City's engineers, and the value of the buildings located in Duluth, amounts to $197,797 even, and of that valuation, assigned to Duluth was $184,148, making a total for real estate assigned to Duluth of $296,218, and located in Duluth, $315,891. The ratio of $296,218 to $315,891 is 93.77. I therefore applied this percentage to the total real estate accruals in 1921 as made by the Company, amounting in total to $5,550, and have arrived at $5,204.24 as the portion of the real estate tax which should be assigned to the Duluth Division.

The Master: And $5,550 was the amount taken for the value of the taxation——

A. Well, those were the lots which we thought should be considered as used jointly.

The Master: Where did you get the amount $5,550?

[fol. 685] A. That is the actual real estate tax accruals for the year 1921 as made by the Company. So I take 93.77% of the accrual as representing the amount of tax which should be applicable to the City of Duluth.

The Master: Do you mean that is the tax accrual on lots $22 to 432?

A. No, I mean that is the tax accrual on all real estate in the City of Duluth, and the tax accrual, therefore, on that portion of lots 422 to 432, which should be assigned to Superior would be $345.76.

The Master: You have only made this apportionment as to the tax on lots 422 to 432, Block 47?

A. Yes. Those are the only parcels of land which we considered jointly used property between the City of Superior and the City of Duluth, or the Duluth division and

the Superior Division. Adding to $345.76—which was the real estate taxes to be deducted, the $851.48—the amount of personal property taxes to be deducted—and adding also the Federal income tax accrual, which amounted to $3,542.17, gives a total tax to be deducted of $4,394.65. Thus the taxes for 1922 should have been, with the Federal income tax eliminated, $76,865.74, in place of $72,021.24 which the Commission actually used in its estimate.

The Master: Mr. McWethy, would you turn to page 28, real estate accrual 1921, $5,560, that is the property located in Duluth the value assigned to Duluth, 5,204.24. That means that that item represents only lots 422 to 432, inclusive, in Block 47, Second Division, does it not?

A. No.

The Master: What do these amounts refer to, then? You take 6.7 percent of that amount and deduct——

A. $5,550 is the total amount which the company set up in 1921 for its real estate in Duluth, their total real estate [fol. 686] tax. Now, on the basis of deduction from the figures above, I estimate that 9317 of that tax accrual should be Duluth. The other 6.23% should be Superior. And the 6.23 percent is $345.76.

The Master: Well, getting that 93.7 percent, do you take into consideration that it is only part of the real estate of Duluth that is used for the joint purposes?

A. Yes, sir.

The Master: How do you get that percentage?

A. Under the first item of land, the value as assigned by the City to all real estate in the City of Duluth, is $118,094. Now, the value of these parcels of land as set out by the City which you have made note of, (Lots 422 to 432), was applied by the City at about $26,000. We considered that of this $26,000 on the car mile basis, 25% should be assigned to Superior, 25% of $26,000 amounted to something over $6,000. We eliminated that amount for the difference between this $112 in column 2 and $118 which we show in column one.

The Master: That was the way you got the value of $112,070 assigned to Duluth?

A. Yes.

The Master: By deduction 25% of $26,000?

A. Yes. Now, the buildings portion of this was agreed to by the engineers.

The Master: That is, a statement as to your present judgment of this, may be a proper method——

A. Yes.

The Master: Then this is not what the Commission did, it is an expression of your judgment of what the proper method is?

[fol. 687] A. That is true.

Mr. Carmichael: On page 28, Mr. McWethy, to the figure $76,865.74 there should be added the Federal income tax?

A. If the Federal Income tax is to be considered.

Mr. Carmichael: What I am getting at, you have not included that in the $76,865.74?

A. It is eliminated.

Mr. Carmichael: It is eliminated, and not included?

A. Yes.

At this point a recess was taken until two o'clock in the afternoon.

[fol. 688] Afternoon Session

Mr. H. C. McWethy, recalled, testified as follows:

Page 29. Discussion relative to Commission's operating expense for 1922. It should be pointed out that $1,039,705.60, which the Commission accepted as representing this estimate of operating expenses and taxes for 1922, represented not only its estimate for 1922, based upon 1921 operating expenses, but its estimate for 1922 based upon this and all other evidence before it, bearing on the question of operating expenses and revenues for the year. It had before it the operating expenses for the different years of 1913 to 1920 inclusive, and made a thorough, comprehensive analysis of values which it had before it unofficially, of the operating expenses of the first four months of 1922. These operating expenses, after adjustment to a yearly basis by tying to each general account the ratio of the first four months of the yearly expense for the same period, it is evident the Commission's estimate of operating expenses for 1922, which in amount corresponded to the 1921 operating expenses as adjusted, was actually a judgment based upon and set forth by the facts corroborating the operating conditions of this particular period.

Mr. Carman: Mr. McWethy, these figures which you have given in your testimony here today and which had been set up in the Commission's Exhibit CC, pages 1 to 29, were before the Commission and discussed by you as the Commission's statistician, with the members of the Commission before the making of the Commission's order of July 13, 1922, (being Exhibit C attached to the bill of complaint in this action).

A. These figures were presented to the Commission in the [fol. 689] main by the Commission's then statistician and I know personally that there were numerous conferences between the Commission's statistician and the members of the Railroad and Warehouse Commission in which these figures were very thoroughly threshed out by the Commission members.

Q. And did you discuss these figures yourself with the members of the Commission substantially as they appear here?

A. Yes, sir.

Q. That was prior to the making of their order of July 13, 1922, fixing the fare, which is attacked in this action?

A. Yes, sir.

Q. One more question. Was that discussion and analysis of those figures done in the course of your regular employment and duties as an employee of the Commission?

A. It was. Section 3, page 30. This is the analysis in the adjustment of the company's 1922 operating expense statement. The recapitulation of Section 2 shows the Commission's estimate of operating expenses for 1922. I will next consider the Company's actual operating expenses for 1922, and compare the result after adjustment with the Commission's estimate for the same period.

Mr. Carmichael: Do I understand we are now going into what the Company actually experienced, and what the facts show as what the Commission estimated might happen?

A. We are now going into the question of what adjustments the Commission would make to the 1922 statement of the Company, to make the operating expense correspond with what the Commission would consider reasonable operating expenses for the year 1922.

[fol. 690] Mr. Carmichael: You say the Company's statement. Do you mean the Company's statement as showing the facts as to what exists on the Company's books?

A. As reported to us by the Company in the report to the Railroad and Warehouse Commission for the year ending December 31, 1922.

Mr. Carmichael: That would be the same as shown by our exhibit 10 in this case?

A. I will have to see the exhibit. I presume that is right.

Mr. Carmichael: The detail of the operating expenses of 1922 was furnished to the other side last Saturday.

The Witness: I think I can answer the question by saying that the operating expenses as compared in this section of the report, are in accordance with the operating expenses as shown in Petitioner's Exhibit 10.

The Master: Exhibit 10 contains the totals of each division, does it not, Mr. Richards? And the statement which counsel says he furnished you, he says were details of that.

Mr. Richards: Yes.

The Master: Which have not been introduced in evidence.

Mr. Richards: Yes.

The Master: And which you have had for examination since when?

Mr. Carmichael: Two weeks ago tomorrow.

The Master: I would like to ask Mr. McWethy: You state that commencing on page 31 was an analysis of the operating expenses for 1922 according to the reports of the Street Railway Company to the Railroad and Warehouse [fol. 691] Commission for that year, and totals for each division, appear in Exhibit 10, and an analysis of those figures as they would be adjusted by the Commission. Do you mean to say, "in your judgment as they would be adjusted by the Commission," or are you giving your own judgment as to how they should be adjusted?

A. I have followed very closely the Commission's judgment as exercised in its application of the 1921 operating expenses, except that there is no labor and material reductions. I followed the principles very closely which they laid down as applying to the 1921 operating expense statement. These are my adjustments.

The Master: What I want is to know whether this is what you think the Commission would do on these figures, or your own judgment?

A. I am endeavoring to give you my own judgment, and what I think the Commission would do.

Mr. Mitchell: But the Commission has taken no action with reference to these pages 31, 32 and 33?

A. It has not.

The Master: It seems to me there is a difference between the testimony of a witness who is competent to pass upon the propriety of these questions giving his own judgment, and that witness or any other witness saying what he thinks the Commission would do if the matters were before them. I would like to know whether this testimony is the testimony of Mr. McWethy's jusgment on this.

Mr. Carman: I understand he was primarily to testify to his own judgment, and that in making these adjustments he had used the same methods of adjustments which had been used by the Commission, so far as actually done in 1921.

The Master: But won't you distinguish, so that we can have before us whether this is his own judgment, or not?

Mr. Carman: I may say that I do not understand that [fol. 692] they represent actual adjustments that have been made; there are some estimates, but not actual adjustments that have been made. I understand the Commission has not actually passed upon and made adjustments, of the 1922 operating expenses to a normal basis. I might state further that in that connection this is not introduced as on the theory that the Commission has power to arbitrarily take any item of actual expense that was paid out, and throw it out as not being proper, but that the Commission does have power to adjust to a normal basis any abnormalities that appear in any of the operating expense; that it has power to adjust the same to a normal basis for the purpose of fixing rates, and that this testimony is therefore relative on that theory, and also as the witness' own judgment in the matter. (To the witness:) Could you explain, Mr. McWethy, how far, if at all, I am wrong in that statement?

The Witness: I think you are right, Mr. Carman. The testimony which I will present bearing on 1922 expense and 1923 operating expense represents my judgment primarily. In forming that judgment, I have been guided very materially by the action of the Commission in its adjustment of 1921 operating expense, and have applied the same

principles as were applied by the Commission in its adjustment of 1921 operating expense.

The Master: Well, do you apply that principle because you believe it to be the correct method?

A. I do.

The Master: Or simply because it was followed by the Commission in adjusting the 1921 operating expenses?

A. I apply it because I believe it to be correct.

Mr. Mitchell: As I understand it now, the witness,—as to the 1922 operating expenses, has made estimates for 1923, and is testifying solely as an expert. There is no [fol. 693] claim that the Commission has in any way acted upon the conclusion which he has stated as his own.

The Master: I so understand it, with the qualification that he has followed the methods adopted by the Commission for the readjustment of the operating expenses for 1921, and states that in his judgment that was a correct method; so that it ultimately rests upon his testimony as to the correctness of that method.

Mr. Mitchell: Of course, in doing that, he is doing as any expert witness; He is applying what he understands the Commission to have done, and is using his judgment in that application.

The Master: Oh, I suppose so.

Mr. Mitchell: We are confronted with a difficulty. Of course, we only know what the Commission did officially by its order, and this witness has certain tables and certain figures which he understands the Commission considered, but they are not a part of the order. I understand he has gone right out on the "limb", and he has got to rest entirely upon his ability as an expert.

The Witness (continuing): Page 31. Included in the Company's report for the year ending December 31, 1922, under Maintenance of Way and Structures, is a total of $68,218.40——

Mr. Richards: Pardon me a moment. Can you show on this plaintiff's exhibit 10 any such total stated and if so, where is it?

Mr. Carmichael: Oh, Mr. Richards, that is piffle. You have been supplied with this exhibit and you know it is going in.

The Witness: I can say this, Mr. Richards, that the total operating expenses on exhibit 10 amount to $1,057,330.74, which is shown in my Exhibit on page 35, which is a recapitulation of the figures which I will use in the detailed discussion.

[fol. 694] Mr. Richards: It would seem as if this would be a proper time to put in evidence an exhibit of the complainant, not yet numbered.

Mr. Carmichael: It will bear Number 37 when offered. It takes into consideration the operating income for the calendar year 1922.

Exhibit marked Commission's Exhibit EE.

Mr. Carmichael: This is one of the statements that you requested and we expect to offer it with Mr. Warren's testimony. We submitted it to the other side two weeks ago and it will bear our number Exhibit 37.

Mr. Carman: Well, it may be understood, then that complainant's Exhibit 37 will be offered and that we may discuss it in connection with this witness's testimony now.

Mr. Carmichael: Well, we will offer it in connection with Mr. Warren's testimony.

The Master: Is this offered at this time?

Mr. Carmichael: Not yet. It is all right for counsel to use it with the understanding that it will be offered. We have it already numbered as complainant's Exhibit 37.

Mr. Carman, continuing:

Q. Mr. McWethy, these figures which you have used here commencing with page 31 of Commission's Exhibit CC, and referring to the Company's 1922 operating expenses, are the figures contained in the Company's statement of operating expenses which you have before you as complainant's exhibit 37?

A. They are in total and in individual accounts, except that in my consideration of this expense I have combined the depreciation items in Maintenance of Way and Structures, and in Equipment, and in Repair, into one item and considered the depreciation as one item. In other respects the figures are in agreement with my figures.

[fol. 695] The Master: That is, you deducted depreciation amounting to $90,733.04 from this item and treated it in another place?

A. I have, yes, sir, and I will explain those deductions as I go along.

Mr. Richards: Also Exhibit No. 4.

The Witness: When I get to that I will explain it. Maintenance of Way and Structures exclusive of depreciation, as set up in this Exhibit 37 amounts to $68,218.40. Included in this amount is an account No. 12, Removal of Snow and Ice. This, according to the Company, amounts to $13,487.40. I have reduced this to $5,000 which I believe to be a more nearly normal amount for this item. It was a matter of testimony before the Railroad and Warehouse Commission that a very severe snowstorm in the early part of 1922, in which this Company experienced an abnormal condition, which accounted for a very large proportion of the $13,487.40, which they report for the year ending December 31, 1922. On this basis, the reduction amounts to $8,487.40; Included also in the total Maintenance of Way and Structures, exclusive of depreciation, is the account No. 15, Bridges, Trestles, and Culverts, at $3,519.09. The average of this account for the period 1913 to 1920 inclusive, amounts to $1,008.89. The Commission has substituted this figure for the actual for 1922, as representing more nearly a normal charge.

The Master: You mean, that your judgment is that the Commission would do that, or that you think that it should be done?

A. I think it should be done and in my opinion the Commission would do it were it to pass upon a rate case at this time.

[fol. 696] Mr. Carmichael: Notwithstanding the Company paid out more than the books and accounts actually showed?

A. Yes. This makes a decrease of $2,510.20.

Mr. Richards: Pardon the question there. Going back to account No. 12, previously your figures in making the adjustment of Snow and Ice in 1921 figured out that the average charge for the period of 1913 to 1920 inclusive was less than $5,000?

The Witness: It was four thousand, nine hundred and ninety some dollars.

Mr. Richards: What is your own judgment as to that being a proper normal amount for snow and ice?

A. It is my judgment that $5,000 would be a normal amount for snow and ice removal.

Mr. Carmichael: Don't you know that in the first five months of 1923 it was $6,748.77?

A. I do not.

Mr. Carmichael: And that we have more to do for the rest of this year?

A. This is based largely on the Company's experience in the past.

Mr. Mitchell: Estimated by a man who has nothing to do with it.

Mr. Richards: Well, we have Mr. Warren's testimony that never in the history of the Company before was such a storm as they dealt with in the Month of February, so I guess the evidence is pretty good.

The Witness: Included also in the account Maintenance of Ways and Structures is account No. 24 Buildings, Fixtures and Ground at $3,409.16. Upon the same principles, and using the same figures that the Commission did in ad- [fol. 697] justing this amount in the 1921 income statement, I have decreased this account by $307.80, thus making a total adjustment of Maintenance of Way and Structures account of $11,305.40, and making the adjusted figure $56,913 even.

Examined by Mr. Richards:

Q. But this figure of $3,101.36, leading to a decrease as stated by you, represents your own judgment as to what is proper and reasonable and normal for that year?

A. It does.

Q. I call your attention to the item of Equalization of Ways and Structures, No. 28 on Complainant's Exhibit 37. What have you to say as to that?

A. Well, the account, Equalization of Way and Structures, No. 28 amounts to $6,399.77. As I understand it, this is an amount which the Company has included, which is in effect a deferred maintenance charge, an expenditure which was not made in 1922, but which the Company esti-

mated should have been made to keep its property in a normal maintenance condition.

Q. Then, to make it clear, this amount of $6,399.77 was not an actual expense in 1922?

A. That is my understanding.

Q. And I gather from what you say that that was to be classed under the head of Company's Estimate of Deferred Maintenance?

A. That is my understanding, yes.

The Master: I want to ask on what theory this adjustment of account 24 was made by you? I don't understand how you got at the snow and ice. You have taken an average of several years and found that the average was about $5,000,—is that it?

A. Yes. I testified this morning in detail as to the principle followed in the adjustment in the account No. 24.

The Master: Was that because the apportionment of the [fol. 698] cost of maintenance was between Superior and Duluth?

A. Yes.

Mr. Carmichael: On account No. 28——

A. I have made no adjustment to that account.

Mr. Carmichael: The Commission did not make any adjustment?

A. The Commission did not.

Mr. Carmichael: And Mr. Smith, the statistician of the Commission did not criticise it?

A. Mr. Smith, nor did the Commission, have these facts before it.

Mr. Carmichael: You used the same line of figures on Exhibit 11 before the Commission for the years 1919, 1920, and 1921?

A. Yes. And it was my thought that the adjustment in 1922 was materially in excess of what that adjustment was in any other year. The next account which I have made adjustments to is account 6, General and Miscellaneous. The amount as shown by the Company for the year ending December 31, 1922, by this account is $154,888.85. Included in this account is the account No. 86 Law Expense amounting in total to $22,197.26. This account includes a legal fee of $15,000 expended in connection with the rate case before the Railroad and Warehouse Commission and

in the Federal Court. The Commission would amortize this account over a period of five years resulting in an annual allowance of this item of $3,000; and a reduction from the company expense of $12,000. This follows up the idea suggested by the Commission to the Company of an amortization of the valuation expenses which suggestion was adopted by the Company for the purpose of this 1922 report.

[fol. 699] Mr. Carmichael: The Commission never suggest that it be amortized.

The Witness: I didn't say that. I don't think——

Mr. Carmichael: Your answer would imply that.

The Witness: I meant to state that the Commission amortized the valuation expense over approximately this same period and that it seemed reasonable, in view of that fact, and in view of the fact that the Company agreed with the Commission in their amortization of the valuation expense, that abnormal expense ought to be amortized in the same manner.

Mr. Carmichael: We do not admit that this is abnormal legal expense.

Mr. Carman: Do you expect to have one of these hearing- every year?

The Witness (continuing): This results in a decrease of $12,000 to account 86 Law Expenses, and leaves in this account $10,197.26.

The Master: When you speak of this amount you mean it leaves in account 86 $10,197.26?

A. Yes. The next account adjusted is account No. 89, Miscellaneous General Expense which is a part of the general account, General and Miscellaneous. This was included by the Company in operating expenses as of July 31, 1922 at $19,454.92. This amount includes an item of $7,914.62 for the Jaeger defalcation. I would eliminate this as an operating charge, leaving as a total of account No. 89, $11,536.30.

Mr. Richards: Why do you eliminate that?

A. I believe that to be a charge which, while it is an amount of money which was actually paid, is not a proper [fol. 700] charge to be included as assessable against the street car rider.

Mr. Richards: It is abnormal?

A. Yes,—I hope so.

Mr. Richards: Unusual, extraordinary, and you hope it will never occur again—all right.

The Witness: The next account included in General Miscellaneous is account 92, Injuries and Damages. This is included by the Company in its report for the year ending December 31, 1923, at $20,828.89, and for 1921 the amount of injuries and damages amounted to $17,280.87. Upon a showing made by the Company expenditures for this item in previous years, the Commission increased this amount by $16,888.98 in its estimate for 1922. Since the actual expenditure for 1922 was $3,548 over the 1921 actual expenditure or accrual, it would seem probable that a new level of expenditures for this item may have been reached. Under the circumstances I will add $5,000 to the expenditure for 1922, giving a total of $25,828.89 as representing a normal charge for this item. And adding this $5,000 to this account results in a total of $25,828.89 for Injuries and Damages.

Mr. Carmichael: On page 21 we find the normal amount for Injuries and Damages to be $24,169.85 and on page 32 we find it to be $25,828.89. What leads to the discrepancy?

Mr. McWethy: I have just explained that.

Mr. Carmichael: Not to my satisfaction.

The Witness: I have said the fact that the Injuries and Damages account for the year 1922 amounted to $20,828.89, and the amount for 1921 amounted to $17,280.87, the question may be raised as to whether or not the Company is on a new level for Injuries and Damages expenditure and I increased the amount for 1922 from $20,826 to $25,000 [fol. 701] as my estimate of reasonable expenditure for 1922.

Mr. Carmichael: Do you know that in the first six months of 1923 they had expenditures of $130,000?

A. I knew the accrual for the last six months of 1922 and the first six months of 1923 is $130,000, but that does not necessarily represent, I believe, the expenditure. It is the Company's estimate of its liabilities in this connection.

Mr. Carman: This further inference and figures on page 21 which was before the Commission prior to making its

order, and the decrease we are now talking about, on page 32 was your own estimate which you are now claiming was before the Commission?

A. That is true. At the bottom of this page I find a recapitulation of the total adjustments charged to General Miscellaneous account amounting to $14,914.62, changing the Company's figure from $154,888.85 to $139,974.23.

Mr. Richards, continuing:

A. Another question. I call your attention to account No. 44 under Equipment $1,341.58 referring to Complainant's Exhibit 37. How do you explain that?

A. That is explained in the same way that I explained the equalization of Way and Structures account No. 28.

Q. Then, it is not an actual expenditure for 1922?

A. That is my understanding.

Q. But what would be called under the head of an estimate for what is know- as deferred maintenance?

A. Yes, sir. Page 33. Taxes. The total taxes for the Company, reported for 1922 amounted to $89,468.54. And included in the above tax accrual is amount of taxes on buildings, land and equipment located in Duluth and used jointly by the Duluth and Superior systems. The adjust-
[fol. 702] ment for 1922 would not be materially different. I have used $851.48. The amount of accrual for the Federal Income tax included in the above total amounted to $12,308.72. I would give effect to the Federal Income tax on the rate of return and would therefore eliminate it from the operating charge,—making a total adjustment of the taxes of $13,160 even. Now, in this respect as far as the Federal income tax is concerned, I have followed the Commission's method as established in its decision, and I desire to say that it is not my judgment that the Federal income tax should be excluded. This makes a total adjustment,—total taxes as adjusted of $76,308.54.

Mr. Richards:

Q. I call your attention, according to plaintiff's exhibit 37, to the account 215. Have you any explanation to make of the figures there as to the facts assignable—they seem to be different?

A. I have no explanation to make. The figure which I have used is, I believe, in accordance with the report of the Company to the Commission.

Mr. Richards: The point is that it does not appear that anything more has actually been paid in 1922 than $89,468.54 for taxes?

Mr. Carmichael: I make no such claim, that anything more has been paid.

The Witness: As a matter of fact, Mr. Richards, the $89,468.54 does not represent tax paid. It represents a tax acctual for the year. It is an estimate of the taxes which the Company thinks it would be liable to pay in the year 1922.

Mr. Richards:

Q. Mr. McWethy, do you know the rule of the Federal department in the matter of income tax as operating ex-
[fol. 703] penses?

A. What do you mean by Federal Tax?

Q. The practice of the Internal revenue Department in allowing deduction of income tax in its report, on that basis of depreciation.

A. I am not sure about that, Mr. Richards. Page 34. Other accounts. An analysis of accounts Maintainance and Equipment, Power, Conduction Transportation, Traffic and the primary accounts which have not been adjusted herein. This shows that they are about normal; considering the rate for labor and material, some of them were lower than for 1921 and 1920, and this should have been so because of reduction in labor and material costs. The Equalization accounts, meaning accounts numbered 28 to 44, take care of the difference very liberally. Non-operating revenue: the Company received the following non-operating revenue in 1922 which may properly be considered as operating revenue. Income from transmission line, $296.50; income, Interest on Bank Balance, $2,882.59; making a total of $3,179.09.

Page 35 is a recapitulation of income account as set up by the Company, with depreciation, summarized near the bottom of the page. The adjustments which I have made and the totals as adjusted are shown in the last column.

The total operating expenses, including taxes, are $1,057,330.74, as set up by the Company. $46,962.61 is the net amount of the adjustment, leaving $1,010,368.13 as my adjusted figure. Then, comes the adjustment in taxes and in the last line the operating expenses including taxes are shown, showing as per the Company's books $1,146,799.28 and per my revised estimates, $1,086,676.67.

Mr. Richards:

Q. Right there I will say, referring to the total last stated on page 35, that if the two items of deferred main- [fol. 704] tenance in accounts 28 to 44 were deducted from the total operating expenses as shown here, it would be reduced by such totals of those two items——

A. Yes, that is true.

Q. —if it is not proper to include those items in operating expense as deferred maintenance, for the purpose of such an action as this?

A. Yes. On page 36 I have set up a comparison of the Commission's 1922 estimated operating expenses and which are also set forth on page 24 of this exhibit, and compared those operating expenses as estimated by the Commission, and used in its decision, with the actual operating expenses for the year 1922 as adjusted by me. This shows that the Commission actually over-estimated the Company's expenditures by $29,342.47, a percentage excess of 2.9 per cent.

Mr. Mitchell: That is a comparison of the Commission's estimate with your revision of the Company's actual expense?

A. It is.

Mr. Mitchell: But you don't compare that with the Company's actual expense as shown on its books?

A. No sir. Page 37 is a comparison of the Company's actual 1922 operating expense and the Commission's 1922 normal operating expenses——

The Master: Before you leave 36, you take the depreciation as found in there, also, as found by the Commission?

A. Yes—$115,000.

The Master: Is that your judgment as to what the depreciation should be, what the allowance should be?

[fol. 705] A. It is. I perhaps should amend the answer to that last question and state here again that I have endeavored to follow the Commission's estimate of what that depreciation should be. My report showed that the depreciation should be ninety-one thousand and some odd dollars on this property, the annual charge, and I have not changed my opinion as to that amount.

Mr. Mitchell: This is the only case that has ever been before the Railroad and Warehouse Commission, in which a final order was made, is it not?

A. I think that is true. I think we had something to do with the Twin City case.

Mr. Mitchell: Those have not been had yet?

A. Not the permanent rate hearings, no. There was an emergency rate hearing before the Commission.

Mr. Richards:

Q. You say you have not changed your opinion in regard to depreciation. So, if your view of the proper depreciation would be taken, it would revise the depreciation that you have figured in this page 35 by the difference bet-een $91,000 and $135,742.59, wouldn't it?

A. Yes, sir.

The Master: I think it is the difference between $91,000 and $115,000.

A. Yes.

Mr. Richards: Yes, that is right, approximately $24,000.

A. Yes.

Q. Now, taking your own views as to the inclusion of the Federal income tax as an operating expense.

Mr. Carmichael: That is objected to. That is a matter of law. Mr. McWethy is not qualified to pass on that.

[fol. 706] Mr. Richards: And taking into consideration the fact that the moneys represented in the two charges, accounts No. 28 and 44, are not actually made and should be eliminated; and taking your own estimate of what the proper depreciation annually should be, will you please make, for the purpose of the record, a computation using the last figure stated on page 35, and state the new result?

Mr. Carmichael: Objected to as calling for a legal conclusion.

(Objection and exception noted.)

Short recess.

The Witness: If I were to eliminate from the operating expenses as estimated by the Commission for 1922 the difference between my estimate of depreciation of $91,345 contained in my report and the $115,000 which has been included in Section 3 of the Commission's estimate of depreciation, amounting to a difference of $23,655—if I were to include the Federal income tax accrued for the year ending December 31, 1922, amounting in total to $12,308.52, and if I were to exclude from the operating expenses the two items of equalization expenses, accounts No. 28 and 44, amounting respectively to $6,399.77 and $1,341.58, I would have a total reduction in operating expense of $19,-087.83. This is the amount deducted from the $1,086,-676.67 estimated for 1922, a net of $1,067,588.84. The third column on the page does not include taxes. The items down to the item of Railway operating expenses as adjusted by the Commission in both pages 35 and 36 are $1,010,367.13. Then, when taxes are considered it leaves $1,086,676.67 which I have used for the purposes of this computation.

Page 37. This is a comparison of the actual 1922 operat-[fol. 707] ing expenses as reported by the Company, with the Commission's 1922,—or with my estimate of 1922 operating expenses of the Company, together with the operating expenses as reported by the Company, averaged for the years 1913 to 1920 inclusive. I have already testified that the Commission gave consideration to operating expenses for each of the years 1913 to 1920. This comparison is made here so that the Court may have some idea as to what those operating expenses were during this period.

Page 38 is comparison of the Company's statement of actual operating expenses for 1922 with the Company's estimated operating expenses for 1922 as testified to by Mr. Warren before the Railroad and Warehouse Commission on January 30, 1922. This was Company's Exhibit 22 before the Railroad and Warehouse Commission; that

is the figures showing the estimate by the Company. This table shows that the Company over-estimated its operating expenses for 1922 by 6.81 percent in the data which it presented to the Commission for its consideration in the disposal of the rate case before it.

Page 39. Income account for 1922 as revised. In the following analysis of Income Account for 1922, an effort has been made to set up operating revenues as they would have been had the Commission's order been effective. The total revenue passengers for 1922 actually was 25,572,187. The total revenue passengers from August to December inclusive, 1922, were 10,316,496. The six cent fare was effective from August to December. Had the Commission's rate been in effect we estimate that the revenue passengers would have been approximately four percent in excess of the actual number under the six cent fare. Four percent of 10,316,496 equals 412,660. During the period of August to December the jitneys hauled revenue [fol. 708] passengers at the rate of approximately 1,000,000 per year. (See Mr. Warren's testimony.) 5/12ths of one million would be 416,667 passengers. During the first seven months of 1922 no definite data is available as to the extent of jitney competition. It was found from Mr. Warren's testimony that such competition existed to a material extent. For the purpose of this estimate we will assume that had the jitney business been properly regulated during this period the Street Railway Company would have carried at least eight hundred passengers per day more than was actually carried. Eight hundred times 31, the days of the month, twice seven, the number of months, is a total of 168,000 revenue passengers; thus giving the total revenue passengers, with the Commission's rate in effect, and a proper regulation of jitneys, of 26,569,514. The Commission's estimate that with a six cent fare and a five cent ticket rate in effect, 66 2/3 percent of the passengers would ride at the ticket rate and 33 1/3 percent at the cash rate. On this basis the average fare would be one-third times six cents which equals 2¢. Two-thirds times 5, 3.333,¢ a total of 5.333¢ would result in a total passenger revenue of $417,040.75. Other revenue from transportation and other railway operations, actually reported by the Company, $13,056.28; non-operating income to be

included—this has been admitted by the Company as a proper inclusion—$3,179.08; giving a total railway operating revenue of $1,433,376.12. The total operating expenses, including taxes as adjusted by me, for 1922, amounts to $1,086,676.67. The difference between this figure and the total railway operating revenue amounts to $346,699.45. The Commission's fair value on December 31, [fol. 709] 1922, was $4,599,978.22. The percent return of the Commission's fair value was 7.54 percent. The amount available for return, reduced by the Federal income tax accrual $12,308.52, would be $334,390.93, and this, with the Federal income tax included as a part of operating expenses, would result in a 7.27 percent return on the Commission's fair value.

Mr. Richards: Will you please make a calculation, based upon your statement of total railway operating revenue put at $1,433,376.12 by comparison with the figure $1,067,588.84, which they arrived at in consideration of page 35, with certain adjustments?

A. Are you speaking of Railway revenues or expenses?

Q. Both. I am calling your attention first to your own view as to tax adjusting on the basis which they found as a depreciation figure, $93,145, and eliminating the two items for equalization of maintenance and equipment $6,399.77 and $134,158, and using which figures, should be reached a total $1,067,588.84 as the adjusted operating expenses for 1922 on the basis used. Now, I ask you to make a comparison and show the percentage in the record, with this figure of $1,433,376.12 and the figure of $1,067,588.84 as the assumed operating expense for the year, and see what the percentage is.

The Master: Do you want him to correct all these figures or just that one figure as to what would be available for revenue?

Mr. Richards: Available for return.

The Master: Then, it would be simply deducting $1,067,588.84 from that?

Mr. Richards: Yes, and figure the percentage of return [fol. 710] on that basis.

The Witness: That would result under your assumption, Mr. Richards, in a return on the Commission's fair value of 7.94 per cent, approximately.

The Master: What is the total return?

A. $365,787.28.

The Master: Then, you deduct $1,067,588.84.

A. Section 4 is my analysis in adjustment of the Company's statement of operating expenses for the year ending June 30, 1923.

Examined by Mr. Mitchell:

Q. I want to ask a question about this 39 and 40. How did you, beginning at the last part of page 40, how did you get the item $12,308.52? What is that?

A. That is the amount of Federal income tax reported to me by Mr. Robertson as having been accrued in the year ending December 31, 1922.

Q. Based upon a return of how much? Exhibit 10 shows that, I think.

A. I don't know what it is based on.

Q. You know what Exhibit 10 shows?

A. I presume it *it* based on net. It has some relation to net income shown on Exhibit 10.

Q. The same statement that shows $89,468.12 shows the operating income $222,306.76—no, it shows the income before taxes. Now, your statement found on page 40 shows at that point $334,390.96. If you increased that net income or operating income by the difference between those figures, you would have to pay out one-eighth of that additional amount to the Federal government at Fedefal income tax—12½%.

[fol. 711] A. I do not pose as an expert in tax matters, but I think that is correct.

Q. Well, then, I am merely calling your attention to the fact here that the amount which you are deducting, after Federal Income tax, is not based upon the income that you are reducing, but based upon an entirely different figure?

A. No, it is the actual accrual by the Company, as it estimated the income tax would be for the year ending December 31, 1922.

Q. Yes, but that is not based upon the earning such as you are showing on page 40?

A. I presume not, though I don't know.

Q. Well, you are swearing to that, that you don't know that their actual is based on their books?

A. I don't know what this income tax accrual is based upon.

Q. You have a pretty strong opinion, don't you, that is based upon their books?

A. It is based upon their estimate of what their net income for 1922 will be. I don't know what that estimate is.

Q. After their tax returns are made and sworn to——

A. This amount will be adjusted then, after the tax returns are made.

Q. Then, if you are getting for them, by this basis over $100,000 more money than their books show, it would not be unreasonable to expect that their Federal tax would be larger by 12½% of that amount?

A. I think that is true.

Q. Now, this statement that you have is also based on the assumption that one-third of the passengers would pay the [fol. 712] six-cent fare?

A. Yes, sir.

Q. If your assumption is erroneous then this estimate is erroneous?

A. Yes, sir.

Q. You also assume here that payment of a six cent fare upon the number of reding passengers of four per cent——

A. It is based largely upon the Company's testimony before the Commission.

Q. Yes, but you apply that where it results against the company, but you don't apply it where it would work in the company's favor?

Q. Well, It is my opinion, if I get your question correctly, that the installation of the Commission's fare would have very little effect on the number of passengers that would be carried under a five cent fare, due to the fact that, with the tickets in effect, more passengers could be handled in the same space of time, more easily, that the reding conditions would be better; and it is my opinion that under the Commission's rate of fare, the number of revenue passengers would have been decreased very little if any over the number of passengers which it would have carried on the five cent fare. Now, if the Company's estimate of 4% decrease with the six cent fare in effect is correct, then my assumption here is right.

Q. Well, you heard Mr. Warren's testimony in which he stated his estimate of four per cent decrease, and you also heard his testimony, where he estimated that under the Commission's rate of fare, 95% of the people would buy the tickets, and only five per cent of the riders would pay the six cent cash fare?

A. Yes, I heard that.

[fol. 713] Q. You also heard him testify to the effect that if that was the case he would not think that the Commission's rate of fare would materially reduce the number of passengers?

A. I think that was his testimony.

Q. Now, what you have done is to assume here, from your knowledge as an expert, that no five per cent, as Mr. Warren says, but 33⅓% would pay the 6¢ fare?

A. As a matter of fact I had forgotten Mr. Warren's testimony to that effect.

Q. Well, what I have just said is right, you have assumed 33⅓%?

A. Yes.

Q. But you have assumed that Mr. Warren's estimate that the necessity of paying six cents would reduce riders by four per cent would not apply to this one-third. Do you think that is a fair assumption?

A. I do, for the reason that I think that with the placing of the ticket rate in effect, the reduction which would come about by the six cent fare, would be more than made up by increases in the ticket fares; so that in my opinion even with the 33⅓% cash and 66% tickets, there would be very little reduction in street railway travel over street railway travel at a straight five-cent fare.

Q. You think the tickets would be pretty popular?

A. I think they would be popular to the extent of about 66⅔.

Q. You think they would be popular, but not so popular that they would ride one hundred per cent. But you think that while the six cent fare would scare out four per cent ordinarily, 33⅓% would walk up to the trough and pay [fol. 714] their six cents and not drop off at all.

A. I think that on the average the Commission's rate of fare would not have decreased the revenue passengers materially over the five cent fare.

Q. Your judgment is based not upon any operating experience that you have ever had?

A. No, sir.

Q. You have never had any?

A. No, sir.

Q. Now, you also worked out a very ingenious thing on page 39, in which you add passengers very rapidly. You say that if jitney bus business had been properly regulated, that you think the Company would have carried during the first five months? Does all this addition from the jitney business that you have worked out here come in the last seven months or is it partially during the first five months?

A. The 168,000 is the first seven months.

Q. Now, you guess there, using you- ability as an expert, you say that if the same had been properly regulated, the jitneys, that during the first seven months when the five cent fare was in effect—the street cars would have carried 168,000 more people.

A. Yes, it is my opinion that with a ticket rate in effect, the ticket rate of five cents in effect, the jitneys would not have had a chance to be the competitive factor which they have developed into.

Q. How can you put a ticket rate in effect seven months before the Commission has made an order? The Company was under cont-act at five cents.

Q. There was no ticket rate at this time. The jitneys [fol. 715] were evidently not regulated.

Q. They were not. You read that just right. Do you think the Company should have regulated those jitneys?

A. I am not placing the burden upon the Company for the non-regulation of jitneys.

Q. But you are, by this quite remarkable estimate of yours, charging the Company up with 168,000 passengers that rode the jitneys when the Company was tied up on a five cent cont-act, do you realize that?

A. Well, I tried to set up here——

Q. That is what you have done, isn't it?

A. —what the conditions as I said in the beginning—what the conditions would have been in 1922, had the Commission's order been in effect.

Q. And had the City properly regulated the jitneys?

A. Yes.

Q. And had the people in the number that you estimate all ridden?

A. Yes.

Q. And had one-third of them paid the six cent fare?

A. Yes.

Q. And had the Company been able to operate for the expense that you have estimated?

A. Yes.

Q. Your conclusions, Mr. McWethy, is a fair illustration of the difficulties that the expert gets into at times when he undertakes to get into the practical field. Of course, if all these things had been, then the results would have come?

A. Well, I don't think it is necessary for me to repeat that this estimate is my best judgment as to what might happen, or what would happen, or what would have happened in 1922 had the Commission's rate been in effect.

Q. If the conditions had been ideal?

A. Not necessarily, ideal.

[fol. 716] Q. Don't you think it would be ideal, from a railway standpoint, if we did not have any jitney competition?

A. It would be reasonable.

Q. And if people were so fond of paying out their money that one-third of them would pay six cents rather than five?

(No answer.)

Mr. Carman: Isn't it a fact that this estimate here entirely leaves out a lot of assumptions in favor of the Company such as the jitney competition increase (to the extent which it increased after the six cent car rate was put into effect) that it was the competition that took away the short haul, the profitable haul that the Company would have had if the six cent rate had not been put in?

Q. That is true. There has been no adjustment made in my estimate to take into consideration the increased operating expense per passenger, because of the fact that the Company was hauling a larger proportion of the long haul passengers than it did previous to the time the jitney competition went into effect.

Mr. Carman: It is true that if the Company had had, for the short haul these passengers that the jitneys took away from them after the six cent fare went in, they could have

made a larger profit on hauling those passengers than they made on hauling the average?

A. I think that is true.

Mr. Richards: Do you mean to criticize any organization, municipal, or otherwise, and assume that there has been any improper exercise of power as against the Duluth Street Railway, Mr. McWethy, in regard to the jitney use of the streets?

A. It seems to be the fact that the jitneys have not been regulated in Duluth, but who is responsible for it, I do not know.

The Witness (continuing). Section 4. This is my analy- [fol. 717] sis of the Company's statement of operating expenses for the year ending June 30, 1923. I do not think it will be necessary for us to have the detail of that expense. I can testify to the correctness of the items which are included.

The Master: That is what exhibit?

Mr. Carmichael: It would be the bottom half of Exhibit 11 and 38. 38 gives the detail of the lower half of 11.

The Witness: Page 42. The amount included by the Company for the total of Maintenance of Way and Structures account, exclusive of the depreciation for the year ending June 30, 1923, was $69,609.62. Included in this account was an item of $9,341.09 for the removal of snow and ice. I consider that the normal amount for this account is $5,000. This makes a reduction in this account of $3,441.09. Included in the general account also under bridges, trestles and culverts, account No. 15, is $3,212.81. The average of this account for one-third of 1920 inclusive, amounts to $1,008.89. I would substitute this figure for the actual for the period under consideration as representing more nearly a normal charge. The substitution amounts to a decrease of $2,203.92. This decrease added to the decrease in the account, removal of snow and ice, gives the total reduction to the Maintenance of Ways and Structures accounts of $6,545.01, and gives a revised total for the Maintenance of Way and Structures account of $63,064.61. I have made no adjustment in the general accounts, conduction, transportation, power, and the other general accounts down to account No. 6, General and Miscellaneous. This account

stand per the Company's report at $171,079.37. Included in that amount under Account No. 86 Law Expenses, is $23,717.61. This account includes the $5,000 legal fee expended in connection with the rate case before the Railroad and Warehouse Commission in the Federal Court.

[fol. 718] Mr. Carmichael: Mr. McWethy has put this in here as actual, and we have made no charge this year at all. You could not make that charge against the whole of 1922 and six months of 1923——

Mr. Carman: If it is comparing June 30, 1922 with 1923, you can put in the expense actually paid during that time, and that is just what has been done.

The Witness: As a matter of fact, the law expenses for the year ending December 31, 1922, were $2,197.26, and the law expenses for the year ending June 30, 1923 were $23,717.61. And now I made an adjustment of $12,000 to the 1922 account, regardless of whether or not this included the specific fee which is under consideration here. My judgment would not be changed as to the amount of exclusion. I believe that a normal law expense should be, for the year 1923, approximately $11,717.61.

Mr. Richards: Right there, Mr. McWethy, if you please, over what period of time did you make any estimates to determine what would be a normal charge for legal expenses?

A. Well, I estimated in connection with the 1922 expense that the legal fee of $15,000 should be pro-rated over a five-year period.

Mr. Richards: That would account for $3,000 of that $15,000 charge?

A. It would account for the inclusion in the expense of $3,000 of the $15,000 and would mean an elimination of $12,000 from the account.

Mr. Richards: Oh, you mean from $23,717.61, you are allowing the difference?

A. Yes.

Mr. Richards: As I understood you to say, a normal charge?

A. Yes.

Mr. Richards: Is that based upon an examination of the books of the Company over a period of years, like in the other matters of snow and ice that you have spoken of?

[fol. 719] (No answer.)

The Master: Well, isn't it based upon this, that you have taken the expenses of the Company's report for the year with the one exception of the $15,000 charge for the rate case, and eliminated $12,000 of that charge by amortizing it over five years?

A. Yes.

The Master: And you have accepted the other charges?

A. Yes.

The Master: And that leaves that balance?

A. Yes.

Mr. Richards: But my theory goes to how to arrive at $11,000?

A. The balance of $11,000 is simply the charge which the Company makes to that account of $23,000 off dollars, less $12,000.

The Master: You have not attempted to analyse that?

A. No.

The Master: Or pass in judgment on it?

A. No.

The Master: But just accepted their statement?

Mr. Carman: And the effect of this amortization of the $5,000 fee, being considered in the return for rate-making purposes, is to allow an average of $3,000 per year in addition to all the other normal expenses for law and so forth on account of the rate-making difficulties alone?

A. That is true.

Mr. Mitchell: Then, if there is a corresponding charge this year, we will have to amortize that, I suppose, so that there will be two allowance in this year.

Mr. Richards: Assuming there was nothing reported as a legal expense in the year 1910 and the years 1911 and 1913, was not that an element proper to be considered in determination what the normal or legal fee would be?

A. Only very remotely.

Mr. Richards: In some years there are legal services and some not, except for any retainer.

A. That depends on the situation arising as the years go on.

Mr. Richards: It is possible to go through the books of [fol. 720] the Company and find out what they have actually paid for the last ten years, so you will arrive at some kind of an idea?

A. I think so.

Mr. Richards: But you did not do that?

A. No, sir. The next account, page 43, Miscellaneous General expenses. This is set up by the Company at $16,363.57. This account includes an item of $4,217.53 for the Jaeger defalcation. I would eliminate this item as an operating expense charge. This $4,000 item added to the $12,000 adjustment on law expense makes a total adjustment of $16,217.53 and gives as an adjusted total to the General and Miscellaneous Expense account $154,861.84.

Mr. Carmichael: Before you leave that. Have you Exhibit 38 before you? Just compare that for a moment. Item 28 on Exhibit 37. Mr. Richards called your attention to that item and has neglected to, on Exhibit 38. There is one which is a credit and the other a debit.

A. Exhibit 38 shows a credit of an equalization of Way and Structures, of $2,142.10, which would indicate overmaintenance, while on Exhibit 37, which is for the calendar year of 1922, equalization of Way and Structure shows a debit of $6,399.77.

Mr. Carmichael: And a similar situation shows on account No. 34, equalization of equipment?

A. Yes. Page 44. Depreciation, total depreciation for the Company is $136,978.22. The Company shows in addition to this allowance for depreciation reserve for the year ending June 30, 1923, over the calendar year for 1922, $1,235.59. Adding this amount to the Commission's allowance for 1922 gives us a total for the period under consideration of $116,235.59. This is net adjustment to the Company allowance of $20,742.63.

Mr. Richards: Right there, Mr. McWethy. You have stated your opinion in regard to the proper depreciation, that it is 2.3% of the depreciable property which as applied to 1922 estimates, would reduce the Commission's [fol. 721] estimate to an extent of $23,000 and a little more.

A. Mr. Richards, I want to qualify that statement there, because the 2.3% of physical property included in my report is not the same amount of physical property as the Commission included in its 2½%. That is, the difference between 2.3% on the Commission's physical property would not be the difference between $91,345, my estimate of the depreciation, and the Commission's estimate for depreciation.

Mr. Richards: I will just take your own views as to the proper depreciation, then, and ask you what additional adjustment you would make in comparing the Commission's basis of $116,235.59. Would it be practicable, adding to that adjustment the sum of approximately $23,000, or what would the figures be?

(No answer.)

Mr. Richards: Never mind, we will leave that until we get to the end of the year.

The Witness: Taxes. We have assumed that one-half the total tax accrued for the year 1922 would be applicable to the last half of the year and have added to this the actual accrual for the first six months of 1923; one-half of $89,468.54 equals $44,734.37. The first six months of 1923 shows an accrual of $46,651.21, making a total of $91,385.48. In handling the detail of the above accrual, we have assumed that the same adjustments made in the 1922 taxes by me would be applicable. This adjustment is as follows: Decrease in personal property and real estate tax, $851.48; Federal Income tax eliminated, $12,308.52; making a total adjustment of $13,160. This amount deducted from the $91,385.48 leaves taxes as revised at $78,225.48.

Page 45. This is a recapitulation of the Commission's—of my adjustment to Company's statement of operating expense for the year ending June 30, 1923. I wish to qualify again that statement that this constitutes my adjustments. I have eliminated Federal income tax from this statement, and my judgment dictates that Federal income tax should [fol. 722] be included, but I have followed——

The Master: Outside of that, is it your judgment?

A. It is except for depreciation.

Mr. Richards: And how much have you reduced this total here under your adjustment of the item of depreciation?

A. Well, I don't know just how much I would reduce it, Mr. Richards. It would be—I would add to my depreciation allowance, which I figures at $91,345, something for additions and probably—I don't know just what addition would be—it would probably be in the neighborhood of the amount which the Company has added, if we were to assume that——

Q. Would you say approximately $1,200?

A. I presume it would be in the neighborhood, yes.

Mr. Richards: Make the adjustment on that basis, please.

A. Making the adjustment on that basis would make the same net difference between the Commission's figure and mine as we figures in the previous section.

The Master: That would give you a depreciation of approximately what?

A. It would make my depreciation approximately $92,545. That amount deducted from the depreciation which I have here of $116,235.59 would give an adjustment on the depreciation of $23,690.59.

Q. And supposing now that, say, what would the figures be, as adjusted?

A. Considering the depreciation and income tax, this would give a net adjustment to the figures, which I have done in the recapitulation on page 45 in the last column, of $11,382.07.

Q. And that would be deducted from the $1,144,454.18, the last figure on the page?

A. It would.

Q. Leaving a balance of what?

A. $1,133,072.11.

Mr. Carmichael: Which goes to the equalization account for the year ending June 30, 1923?

A. It does.

[fol. 723] The Master: I understand it is conceded by all parties that, in determining the net return, if the federal income tax is to be included as an operating expense, the formula to be followed is as follows: Total operating expenses, except federal income tax, should be deducted from total revenue. From the remainder so found, interest should be deducted, and upon that remainder 12½% should be computed, which will give the federal income tax. Thereupon, the amount of the federal income tax is added to the operating expense formerly taken, and the amount available for return is then computed as a rate base by deducting total operating expenses, including income tax, from total revenue. Further, in the first computation state taxes are included as an operating expense.

The Witness: Page 46. I am taking expense as set forth on page 45, as adjusted by the Commission in the last column and have apportioned this into two items; in the first column fixed expense; in the second column variable expense. The fixed expense I consider those expenses which

would not increase or decrease with an increase or decrease in the car miles operated; and the variable expenses are those expenses which would increase or decrease with an increase or decrease of car miles operated by the Company.

This shows, I believe, a total to fixed expense, including taxes of $454,770.23; the variable expense of $689,683.95, a total of $1,144,454.18, which agrees with the last column on page 45.

Mr. Richards: With a similar adjustment, it would be $1,133,072.18?

A. In total, yes. Will you pass to page 47, in which a further discussion is had with regard to the variable and fixed expenses? From the preceding table of total expenses, including taxes for the year ending June 30, 1923, which was divided between fixed and variable expense as follows. I have already testified as to the division. The variable portion of these expenses are those expenses which are in-
[fol. 724] creased or decreased as the service, that is the car miles, is increased or decreased. The total miles for the year ending June 30, 1922 amounted to —. The car miles for the year ending June 30, 1923, were —, or an increase of 266.48 car miles, which is an increase of 8.2%.

I stated at the beginning of Section 4 that this was to be an estimate under operating conditions similar to the operating conditions under which the Cimmission issued its order, which would be necessary in my opinion to find what the operating expenses for this year would have been, had car miles operated by the Company been the same as for the year 1922. The percent of the year ending June 30, 1923, of the calendar year of 1912, is 92.4. This increase in service has been made in face of the fact that on the average street railway passengers have been decreasing in numbers. Had the service remained as in 1922, the variable portion of the operating expenses would have been approximately 92.4 of $682,683.95, or $637,267.97. Adding to this the fixed expense of $454,770.23, gives a total estimated operating expense , including taxes, for the year ending June 30, 1923, with service conditions as they were in 1922, of $1,092,038.20.

Mr. Richards: Now, that figure, also, if readjusted as you did on page 45, would be restated in what figure?

A. Well, there would be approximately $11,382.70 less. Railway operating revenues: The total revenue passen-

gers, year ending June 30, 1922, was 25,521,345. If passengers had not been reduced by jitney competition, made possible by the six-cent fare, there would have been approximately an additional 1,000,000 passengers during this period. (See Mr. Warren's testimony.)

Mr. Carmichael: Do you mean to say that Mr. Warren testified that a million more passengers would have been carried at the Commission rate, than at the six-cent fare?

A. It is my impression taht Mr. Warren's testimony was [fol. 725] to the effect that during this period there were approximately a million passengers being carried by jitneys——

Mr. Mitchell: But he did not say that all would have ridden on streets cars.

The Witness: —and that that, in his estimate, was actually the figure for the actual riding in jitneys,—conservatively.

Mr. Carmichael: But Mr. Warren did not say that the number of people riding in jitneys was made possible by the six-cent fare.

The Witness: It is my judgment, based upon Mr. Warren's testimony, that this company, during this period, would have handled one million more passengers than they actually did handle, had there been no jitney competition. This makes a total estimated number of passengers, had the Commission's rate been effective, of 26,521,345. The Commission's estimate was that with a six-cent cash fare, and five-cent tickets rate in effect, 66⅔ passengers would ride at the ticket rate, and 33⅓ at a cash rate. On this basis, the average fare would have been 5.33¢. 26,251,345 revenue passengers at 5.33¢ would amount to a total passenger revenue of $1,414,471.64. And adding other railway operating revenue, $14,240.32, and the non-operating income, which should be included in operating revenues, of $3,179.09, gives a total of $1,431,801.05 as total railway operating revenue on this basis. The total operating expense and taxes, as set forth at the bottom of page 47, and as revised to give effect to reduced number of car miles, amount to $1,092,038.20. This leaves an amount available for return of $339,852.85. Now, this amount available for return amounts to 7.39% on the Commission's fair value as of December 31, 1921, of $4,599,978.22. It also amounts

to 7.15% on the Commission's fair value, plus additions for the Company, to December 31, 1922, amounting in total to $4,753,413.60. With an amount available for return of $339,852.85, reduced by the amount of federal in- [fol. 726] come tax accrual $12,398.52, the amount available for return would be $327,544.33. This would give a return on Commission's fair value of 7.12%.

Mr. Richards: Now, Mr. McWethy, if you please, will you add to that the adjustment made on your basis for depreciation?

The Witness: Mr. Richards, may I postpone the answer to that question, until I have finished with this?

Mr. Richards: Yes.

The witness: It should be pointed out that in the above no account has been taken of the decrease in revenue passengers due solely to the increase of the six-cent fare instead of five-cents; the Company estimated that this decrease would be 4%. Were the revenue passengers actually carried in the year here under consideration to be increased by 4%, this would add to the actual revenue passengers of 25,251,345 a total of 1,010,054 revenue passengers, which in turn would increase the net amount available for return, as shown above, by approximately $53,869.54. It is our opinion that the company's estimate of decrease of 4%, with the installation of the six-cent fare, is approximately correct. We would further state that in our opinion the installation of the Commission's rate of 6¢ cash, five rides for a quarter, would result in a comparatively small decrease, if any, over a straight five-cent fare; even assuming that the Commission's rate would have decreased the riding 2%, there would still remain one-half of the total $53,869.54, or $26,934.77, to be added to the net return afailable as set forth in the preceding text. We would also point out that the 1,000,000 revenue passengers hauled by jitneys, are mainly short haul riders, which class of riders are the most profitable to the street railway company. No adjustment of operating expenses has been made by us to give effect to this factor, but we find that it is a factor which has a very definite bearing on the question of what the Company's financial condition [fol. 727] would have been had the rate prescribed by the Commission been made effective.

Examined by Mr. Richards:

Q. Now I will ask you if you will make the adjustment? You have made a hypothetical adjustment——

Mr. Carmichael: That is all it is.

Mr. Richards: —to cover your own views as to depreciation account. The difference, as I got your figures, before, of the Depreciation Account, by itself, was $23,690.59?

A. That is correct, and I have not included with my statement $12,308.52. Now if I were to adjust item 8 of page 48 by the amount for depreciation, and adding thereto the $23,690.59 for difference in depreciation estimates, I would have $351,234.92.

Q. What per cent would that be upon the Commission'-fair value?

A. Item 8 includes the Federal Income tax as set up.

Mr. Carmichael: On entirely different earnings,—not on the Company's books——

A. That is true. It is the Federal tax accrual for the year 1922. As a matter of fact I presume the Federal tax accrual for 1922 was considerably in excess of the figure we used. I did not have the actual accrual for the year ending June 30, 1923, at hand.

Mr. Mitchell: Now, if you are going to increase the net earnings of the Company you are going to increase its Federal tax.

A. I think that is a factor that has not been considered here, yes.

Mr. Richards:

Q. Now will you tell us the percentage on the basis—$351,234.92 as you gave the testimony?

A. That would amount to a return of the Commission's fair value, on $4,599,798, of just 7½%.

Mr. Carmichael:

Q. Do you think it would cost any more to carry this additional million passengers you are giving to us?

A. There would probably have been some additional cost [fol. 728] incident to that million passengers.

Mr. Mitchell: And some additional income tax?

A. Yes.

Mr. Carman: The additional cost of hauling another million passengers, when we run the same number of cars on the same number of car miles would be small.

Mr. Carmichael: We object to that, the man is not qualified, never engaged in operation in his life.

A. The additional cost would be very slight.

Mr. Mitchell: I would like to get these passengers to ride at a time when the cars are running light. That would be the ideal condition.

A. This estimate is made on service conditions as nearly as we could estimate them as of 1922. It was particularly pointed out to the Commission that the city at the time did not expect any increase in service. Mr. Warren, in his testimony before the Commission, in estimating the operating expenses for 1922, added but 17,000 passengers to his total for the year 1921, which was an increase of approximately one-half of one per cent in consequence; and it was upon the basis of that data that the Commission's order was issued. It did not anticipate an increase in the service such as has been inaugurated by the Company in the first six months of 1923. I don't think there is any question but what an increase in car miles will increase the cost of producing service. Since the conductors and motormen are working on an hourly basis, the extra hours will be paid for by the Company and be reflected in extra operating expense.

Mr. Carman: The expense of these extra car miles would mount up in carrying that million passengers?

[fol. 729] A. I don't get your question.

Mr. Carman: I offer in evidence Commission's Exhibit CC pages 1 to 28.

Mr. Carmichael: Objected to as incompetent, irrelevant, immaterial, hearsay, not purporting to have been made by this man and is not evidence of any public record that I know of.

The Master: There are fifty pages.

Mr. Carman: I am making separate offers of pages 1 to 28. That included figures which the witness testified were before the Commission when it gave its order which is attached.

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The Master: Received subject to the objection.

Mr. Carman: I offer in evidence Commission's Exhibits CC, pages 30 to 50.

Mr. Carmichael: Objected to as incompetent, irrelevant, immaterial, hearsay, admittedly based on wrong computation, and again because it is entirely inadequate because it contains the words, what the Commission would have done, what they did and are going to do, and argumentative because it does not purport to represent what the witness testified to at all.

Mr. Carman: It is offered in connection with the witness' testimony given concerning it.

The Master: You leave out page 29?

Mr. Carman: I leave out page 29. It is covered by the oral testimony.

The Master: That is 30 to 50.

Mr. Carman: 30 to the close of the pages discussed in the witness' testimony today.

The Master: Received subject to the objection.

Mr. Carman: Now Mr. McWethy, will you explain the [fol. 730] last sheet under the same cover in Commission's exhibit CC which has been marked for identification Commission's Exhibit DD?

A. This is a comparison of the Minnesota Commission's valuation for the Duluth Street Railway for the Duluth division with the Wisconsin valuation for the Superior division of the Duluth Street Railway.

Q. That is, with the valuation as shown by the report introduced in evidence in this case at the previous days of this hearing as an exhibit by the City of Duluth?

A. Yes. A. L. Drum & Company prepared the valuation for the Company. The Duluth Street Railway Company before both the Wisconsin Commission and the Minnesota Commission. In the first horizontal line I have set forth the Drum valuation on each of the four bases as he presented them to the Wisconsin Commission. And in the last column I have set forth an average of the four bases. In the second horizontal line I have set down the rate base which the Wisconsin Commission established as of December 31, 1922, of $1,225,000. I then, in the third horizontal line, computed the ratios which this rate base bears to the Drum valuations of the four different bases,

and upon the average of the four bases. This shows that the Wisconsin Commission rate base was 49.16% of the average of the Drum valuations. Then I set forth the Duluth valuations. Under this heading the first horizontal line shows the Drum and Company valuations upon precisely the same four different bases for the Duluth division of the Duluth Street Railway, and the last column likewise is shown the average. The Minnesota valuation as of June 30, 1921, shows on the second horizontal line at $4,593,000, and the last horizontal line the ratio of this value to each of the Drum valuations is shown and the ratio of the [fol. 731] Minnesota Commission's rate base to the average of the Drum valuation is 59.67%. The ratio of the Wisconsin Commission's rate base to the average of all bases of the Drum valuation of Superior amounts to 49.16. Applying this percentage to the average of all bases of the Drum valuations, it gives 49.16% of 7,697,398 and equals 3,784,041. The Minnesota Commission's rate base for Duluth amounts to 4,593,000. It has been the usual practice of the Wisconsin Commission to allow a return of 8% of its rate base. 8% on 3,784,041 would be 3,082,723. The Minnesota Commission has allowed 7½% return on the rate base, of 4,593,000, giving a total of 344,475. So that then, considering the rate of return which the Wisconsin Commission usually allows, the amount which should be available for return on the basis of the Minnesota Commission rate base would be in the neighborhood of $41,000 in excess of what it would be on the Wisconsin Commission's rate base.

Mr. Carman: We offer in evidence Commission's Exhibit DD.

Mr. Carmichael: Objected to as incompetent, irrelevant, immaterial, hearsay, no proper foundation and I think scandalous.

The Master: Is there any evidence in this case, Mr. Carman, that Mr. Drum made his valuation before the Wisconsin Commission on the same basis?

Mr. Carman: He said so.

The Master: The only reason for considering this, that I can see, would be if there was a question in impeachment of Mr. Drum. Is there any evidence that he made his valuation on the same basis.

Mr. Mitchell: The trouble is that the City and Mr. Drum [fol. 732] agreed upon these four bases. I desire to state this in connection with that. Mr. Drum appeared for the Company in the case before the Minnesota Commission and Mr. Gifford appeared for the City of Duluth. Mr. Drum appeared for the Company in the case before the Wisconsin Commission and Mr. Gifford appeared also for the City of Superior. The valuation as set up by Mr. Drum purported to represent, and I think did represent, the set up on bases admittedly comparable with his set-up for the City of Duluth in the proceedings before the Minnesota Railroad and Warehouse Commission, and I think——

Mr. Mitchell: We don't want to have any time on this kind of testimony. We want some kind of testimony that would be competent in court. There is no dispute between the City and the Company here as to the value of the property on certain bases. It is just a question that a——

The Master: There is no dispute as to the reproduction costs of the physical items on a certain base, or a certain average. That is as far as the agreement goes. I don't think this should be considered any further than it appeared that the estimate was made by the same method and with the same prices used. The opinion of the Railroad and Warehouse Commission of Wisconsin might be considered of some probative force, but I don't think it could overrule the Circuit Court of Appeals.

Mr. Richards: I call attention to page 9 of Exhibit M, in which it recites the basis of Mr. Drum's report.

Mr. Carman: We are proceeding upon the theory that if the two systems tied up in one, the two cities, a valuation made approximately at the same time and by the same engineers of the two separate Commissions, that this kind of [fol. 733] comparison is a proper comparison and estimate for an expert witness to make.

The Master: I cannot say that it is proper or that it is improper, but I don't suppose you would claim that it is in anyway conclusive or binding.

Mr. Carman: Certainly not.

Mr. Richards: I would like to call on the other side to produce the written contract, or whatever evidence of the contract they have, with the Barron Collier concern, corporation or individuals, providing for putting advertise-

ments or circulars in the cars of the Street Railway Company, and any documents in relation to that. I am going into the question of the actual income and possible income to be derived from that source.

Mr. Carman: I have another exhibit I would like to put in. This has to do with comparisons of a number of values, including the Columbus, Ohio, in estimating the percentages of fares.

Exhibit marked Commission's Exhibit EE.

Mr. Carman:

Q. Mr. McWethy, I hand you Commission's Exhibit EE and ask you to state whether or not that is a tabulation compared and made by you?

A. It is.

Q. And for what purpose?

A. It is a tabulation based on the data received from the A. L. Drum Company and some correspondence which the Commission has had with numerous Street Railway Companies in various parts of the United States, and purports to show for each of those cities the split between cash and token fares.

Q. You also have American Electric Railway Association indicated as an authority on the bottom of this exhibit. Some of the data which was furnished to me by the A. L. Drum Company was secured through the American Street [fol. 734] Railway Association. This exhibit is set up with the five cent fare and six cent fare and seven cent fares arrange- in order. It shows that for Columbus, Ohio, where there is a six cent fare and five tickets for a quarter in effect, it would amount to a difference of 16.667%, and that there is 7.6% cash and 94.2% tickets as testified to previously at this hearing. This exhibit also shows one other city where there is a six cent cash fare with five tickets for a quarter, namely Marion, Ohio, in which there is a 36.8% of cash and 63.2 tickets. I would like to call the Court's attention in particular to Company's No. 15 straight through to 25, and referring to the per cent cash and per cent tickets as the columns show that the per cent cash there, with the same rate of fares in effect, namely seven cents cash and four tickets for a quarter,—in practically all of these companies named, the per cent cash varies from

9.84% to 20—31.34, 18.80, 15.40, 42.81, 78, 18, 22, 21 and so forth. Even with the same rate of fare in effect, this data shows that there is no hard and fast rule by which one can establish what the per cent cash and per cent tickets will be for any one city. We believe that with this data at hand it establishes, so far as it can be established, that the Commission's estimate of a 33⅓% split for cash fares, and 66⅔% for tickets in Duluth is a fair and reasonable estimate.

Q. State whether or not the data contained in this exhibit is information obtained from the sources commonly used by Commissions and Street Railway Companies, as to the rates, the charges made?

A. It is. A good part of it was obtained from the companies; that should be reliable.

[fol. 735] Q. Now you may state your own opinion as to whether or not the accrual experience of any particular city with a particular rate——

Mr. Carmichael: Objected to, the witness has not shown himself competent to testify.

Q. —has any tendency to prove what the same rate and the same ticket arrangement would result in in another city?

Mr. Carmichael: Objected to.

A. I think that this tabulation shows that what you have stated is correct, that there is no hard and fast rule that you can go by, and that the per cent tickets' passengers which you may find in one city may be no indication whatever what the per cent tickets' passengers you would find in the other city with the same rate of fare in effect. This shows a variation of 9 to 80%, in per cent cash fares with the same rate of fare in effect.

Examined by Mr. Mitchell:

Q. You would expect and assume that transient passengers, passengers not riding regularly would be more likely to pay the cash fare?

A. Yes, sir.

Q. And you would expect the people who ride regularly would buy the tickets?

A. Yes sir.

Q. Then any city which is strung out around like this is and where most of the car riding is done by people who ride every day, there would likely be a larger percentage of them buy tickets than in the city where most people are transient?

A. I don't know that that is true.

Q. If that is true, that would be so?

A. That is true.

Q. It is claimed by the City that the car riding habit of the citizens of Duluth is phenomenal, and if that is so, that would lend color, at least, to Mr. Warren's idea that a large [fol. 736] percentage of them would buy tickets?

A. I don't think that the fact that the car riding habit in Duluth is large would have any bearing, whatever, on the per cent which would buy tickets or cash.

The Master: Mr. McWethy this tabulation you present, Exhibit EE is made up from the reports which you mention here, the publications you mention and from the letters which you received from the companies?

A. Yes sir.

The Master: And from the best information that you could obtain?

A. Yes.

The Master: And you believe them to be correct?

A. Yes.

The Master: Have you got the sources of your information available, so that if the defendant's attorneys desire to they may have it?

A. I have. I have it at my office in the hotel in Duluth here.

The Master: If the gentlemen desire to examine those sources of information I think they should have the right to do so and consider whether this exhibit should be considered or not. You gentlemen presented a statement of what took place in Columbus, Ohio. In itself it is proper evidence if it is material. The witnesses produced, undoubtedly, were competent to testify. Here is this computation presented in data, and I think at least the data from which it is prepared should be at your disposal so that the competency of this exhibit may be considered.

At this point an adjournment was taken until the following morning, Saturday September 8, 1923, at 9 o'clock in the same place.

[fol. 737] Duluth, September 8, 1923—9 o'clock a. m.

H. E. McWethy recalled:

Examination continued by Mr. Carman as follows:

Q. Mr. McWethy, I understand you have a slight correction to make in Exhibit EE, which you identified before leaving the chair yesterday.

A. Mr. Mitchell has called my attention to the fact that on the second page of this exhibit EE Company No. 70, located at Pittsburgh, Pennsylvania, there is a typographical error in the "tickets sold" account, there being a transposition of the figures. The figure now reads 9350, and it should read 9530.

Q. Is that the only correction that you have to make?

A. It is.

Mr. Richards: I understand you to say that the original source of this is here available for the examination of the counsel for complainants?

A. Yes.

Mr. Mitchell: It is a fact, Mr. McWethy, isn't it, that in Indianapolis, which is shown here as having a six cent fare and twenty tickets for a dollar, there is a five cent transfer charge, I mean a two cent transfer charge?

A. There is a transfer charge, and I think it is two cents. May I also add that in my opinion that would have little or no effect upon the split between cash and tickets.

Mr. Mitchell: I may call attention to it though as showing that the rate of return to the company is really more than six cents, five tickets for twenty-five cents——

Mr. Richards: Why so?

A. The two cent transfer charge would of course result in more revenue to the company than the fare which is set down here.

[fol. 738] Mr. Carmichael: That is objected to.

Mr. Richards: My question was, why, in your opinion, would the matter of the two cent transfer have little or no

effect,—what was your idea—on the percentage of the split between cash and the tickets?

Mr. Carmichael: Same objection.

A. The two cent transfer charge is applicable to both the ticket and the cash fares rate, over and above each of those rates, and I see no reason why this would have any effect on the split between the ticket and cash fares.

Mr. Carmichael: A different percentage between six and five and eight and seven, isn't it?

A. Eight cents and seven does not correctly state the average fare, because there is only a limited percentage of the passengers that are transfer passengers.

Mr. Carmichael: The question was, there was a different percentage between six and five and eight and seven, is there not?

A. There is.

The Master: I do not understand that exhibit EE attempts to give the average fare collected.

Mr. Mitchell: No it does not.

The Master: It simply gives the price at which single fares were sold.

The Witness: It does attempt to give the per cent of ticket fares sold.

The Master: Yes I understand that, but it does not attempt to show the average rate?

The Witness: No.

Mr. Mitchell: That, in the absence of a transfer charge, could be easily calculated, but where there is a transfer [fol. 739] charge of course we cannot tell that unless we know the proportion used for transfer and we do not have that information.

A. That is true.

Examined by Mr. Richards:

Q. Mr. McWethy, yesterday on page 39 of your Exhibit Commissioner's EE, which was your revised income account for 1922, you made allowance for and assumed four per cent for decrease resulting from a six cent fare?

A. I made an allowance of four per cent for the revenue passengers carried in the last five months of 1922, yes, amounting to 412,660 revenue passengers.

Q. You are referring now to your page 47 of the same exhibit, Commissioner's EE where you are dealing with railway operating revenues for 1923, of your total including the same item?

A. The total did not include it. On page 49 in my discussion I pointed out that had that factor been included in my table, the number of revenue passengers would have been increased by 1,010,054, and that that would have increased the net amount available for return by approximately $53,869.54.

Q. Will you please make the adjustment in the percentage in the return of the Commission's fair value on that basis in its aditional 5,386,954—also Mr. McWethy, making the same adjustment that you did yesterday, for your depreciation, with a discount of $23,590.59.

A. Considering the adjustment to be on the four per cent increase in revenue passengers at $53,869.54, and the adjustment due the difference in my estimate on depreciation and that of the Commission of $23,590.59, making a total of $77,460.13, and applying this to item No. 8 on page 48, which is the amount available for return, after giving consideration in operating expenses to the amount of the Federal [fol. 740] income tax accrual for the year under consideration, gives me an amount available for return of $405,004.46, which amounts approximately to a return of the Commission's fair value of December 31, 1921 of 8.8% and on the Commission's fair value plus additions per company's report to December 31, 1922, which value is $4,753,413.60 (8.52) I find that I have made an error in the previous computation which I made of 8.1%. That is an error, it should be 8.8%.

Q. Won't you now adjust the correct income tax and produce the figure here as a reasonable certainty, so we won't be floating around with guess work——

A. The income tax which would be paid on the basis of this showing?

Q. Yes. Will you please make that adjustment and restate the total net income and the percentage?

The Master: Do you mean on these last pages?
Mr. Richards: Yes.

A. Well, I could, if I knew the amount of the bond interest and other interest paid.

Mr. Richards: We can give you that. It is in the record. The interest on the funded debt is $125,744.59.

A. Starting with the $405,004.46, which is the net amount available for return, after giving consideration to the 4% increase in revenue passengers occasioned by the installation of the six cent fare; deducting from that $12,308.52 already included in operating expense for Federal income tax leaves a total amount available amount available for return, exclusive of the federal income tax, $392,695.94.

The Master: Won't you please dictate each step into the record? You have the total revenue, how much?

A. Total revenue is $1,481,891.05, before giving con- [fol. 741] sideration to the $53,869.54. My total railway operating revenue, having given consideration to the $53,-869.54, incident to the increase of 4% in revenue passengers, would be $1,485,760.59.

The Master: Is there any non-operating revenue?

A. That includes non-operating revenue and other railway operating revenues.

The Master: That is total revenue?

A. Yes.

The Master: What is the total operating expense without the Federal income tax?

A. The total operating expense, as set forth in table four item two including taxes is $1,092,038.20. That expense includes $12,308.52 of federal income tax. Deducting this amount from the total operating expense, leaves $1,079,-729.68. Now adjusting this operating expense for the difference in depreciation, between my estimate and that of the Commission would result in a further adjustment to operating expense of $23,590.59, leaving $1,056,139.09, as the total operating expenses before any federal income tax is paid but including the personal property and real estate and other taces paid locally to the City of Duluth by the Company. Subtracting this amount of operating expense from the total operating revenue of $1,485,760.59, leaves as the net amount available for return on this basis——

The Master: That is not the net amount of return. It leaves net income upon which to compute income tax.

A. Yes. I will revise my statement then. It leaves as the net amount available for return and federal income tax, $429,621.50. Now, deducting from this $429,621.50, the amount of the bond interest paid for the period under consideration of $125,744.59, leaves $303,876.91 as the amount upon which the federal income tax is to be com-
[fol. 742] puted. 12½% of this amount gives a total in federal income tax on this basis of $37,984.61. Deducting this federal income tax from the net amount available for return and federal income tax of $429,621.50, leaves $391,-636.89 as the net amount available for return; which amount would give a fair return on the Commission's fair value as of December 31, 1921 (of $4,599,978.22) of 8.7%; and on the Commission's fair value, plus additions to December 31, 1922, amounting in total to $4,753,413.60, a return of 8.22% approximately.

Mr. Carmichael: What return would that be, Mr. McWethy, on Mr. McWethy's fair value, as of the time the Commission made its report? I see that in table 1, in Commission's exhibit BB, that Mr. McWethy's fair value, depreciated, as of the time that the Commission made its report, $6,829,898.

The Witness: The figures to which you refer of $6,829,898 is merely my estimate of the value of this property on basis No. 3 of 1921 prices, and is not the fair value which I found for this property.

Mr. Carmichael: Very well, Mr. McWethy. Then will you please do this for me; figure up the rate of return that the income which you have found there would be on the valuation of $6,829,898.

Mr. Richards: My objection to this is that it is entirely irrelevant, a waste of time, immaterial and on a basis repudiated by the decision of the Supreme Court in the Bluefield case.

The Master: Objection noted and exception.

The Witness: On the basis of that valuation it would give a return of just under 5/7% on the basis of $6,829,898 and a return of $391,636.89.

Mr. Carman: On the basis of Mr. Drum's highest valuation at the highest figure, $10,000,000, it would be about half in percentage.

[fol. 743] A. Something over one-half. Mr. Drum's highest value, undepreciated on the basis of 1921 prices, was just over $10,000,000.

Mr. Richards:

Q. I will ask you: this result that you get, leading to an adjustment which gives 8.7% on the Commission's valuation, I will ask you if that represents your best judgment of the effect if the Commission's order had been allowed to go into effect uninterferred with by federal injunction?

A. It does.

Q. And for the reasons heretofore stated and shown in these exhibits, Commission's Exhibit CC?

A. It does.

Mr. Carman: Something has been said about your estimate of fair value as shown on your report, Commission's Exhibit BB. Please state if this was the fair value made by you.

Mr. Carmichael: Objected to, the witness has read that report in full, every word of it and it has been introduced in evidence, argumentative and cross-examination of his own witness.

The Master: Objection noted.

A. The fair value which I found on this property as stated on page 3 of my report which is Commissioner's exhibit BB was $4,550,000 as of June 30, 1921.

Mr. Richards: Mr. McWethy, in your testimony,—I am now referring to Commission's exhibit BB, you discuss a question of the going concern value, and this discussion related to page 14 and the following pages of Commission's exhibit BB I believe.

A. That is true, pages 14 to 18 inclusive.

Mr. Richards:

Q. Is it fair to say that this report and your testimony gave a very large consideration to the question of so-called developmental costs?

Mr. Carmichael: Objected to as incompetent, irrelevant and immaterial, cross-examination of his own witness.

[fol. 744] Mr. Richards: I will withdraw that question. You gave effect in your conclusion to the alleged losses claimed by the Company.

A. I gave effect to what I considered to be normal operating losses incident to the development of this street railway property.

Q. And that conclusion is expressed in your tables 5 and 6 of Commission's exhibit BB?

A. Tables 5 and 6 are calculations of the total losses, normal and abnormal, which the company may have experienced during the period from 1899 to 1820 inclusive.

Q. It is a fact, is it not, that during all of that time there was no such thing as the Brooks-Coleman law and that the company was operating under a so-called franchise or contract rate of fare?

Mr. Carmichael: That is idiomatic. It is alleged in the complaint and admitted in the answer.

A. It is my understanding that that is true.

Q. And that that situation did not change until after the Brooks-Coleman — had taken effect which was in the spring of 1921?

A. I think that is true.

Q. Eliminating from consideration the item of past losses of the company in its history prior to 1921, or prior to the date of the Commission's order, what value would you determine as the going concern value of the Duluth Street Railway Company and how would you determine that valuation?

A. It seems to me if we were to eliminate consideration of all past losses, whether normal or abnormal, that the remaining items for inclusion under the head of going value, would be the costs of developing and operating organization of sufficient efficiency and size to operate the present property. It would be my estimate that the development of such an organization, including all costs, incident to that development, would be approximately $200,000.

[fol. 745] Q. Will you please explain, as applied to the Duluth Street Railway Company, how you would arrive at

such a figure, with as much detail as you can or as is necessary?

A. In a gas, water, heating, telephone or electric light and power company, in an estimate for cost of development of the business and of attaching the business, it would take a certain amount of time and expense to contract for and serve the business.

Mr. Carmichael: What are you reading from?

The Witness: I am reading from a memorandum which I have on this subject.

Mr. Carmichael: Is it copied from any authority?

A. It is not. It is my own memorandum, my judgment and it is incident to my computation of what the going concern value would be on this property, were we to eliminate all consideration of past losses. In a street railway utility no contracts are necessary, and if past losses are to be eliminated, it resolves itself into a situation where the business must be available, the people ready to use the service and waiting for it. This is a difficult situation to visualize, but not any more difficult than to assume a property is to be rebuilt or replaced as of a certain time. If replacement values as of a certain time are to be established, it is equally reasonable and equally easy to estimate the cost of developing the business. In a street railway property it is necessary to consider the following conditions: First, present operating organization. Its efficiency in operation. Number of employees used and needed. Second, payroll of operating company. Third, skilled and unskilled labor employed. Fourth, physical and mental examination required of employees. Fifth, any local conditions requiring special ability of organization. Considering that the going concern value is based upon the cost of developing the organization and that the organization will develope the business, it is [fol. 746] first necessary to study and determine the organization to be reproduced. In any valuation of physical property the general overheads such as organization, administration, supervision and engineering, will include certain general officers. The general manager will and should be paid out of the construction overheads. If, however, this is not the case, his salary should be in the going value cost. The same can be said of the Secretary, Treasurer, Auditor, Engineer, etc. If as is usually the case, only the

executive officers and auditor are included, the operating engineers will be in the going value. It is assumed that in the organization costs of the physical property we have a general manager and an auditor with such assistants, as are needed to carry on the construction work and handle the accounts until the operating starts. While the construction is going on the operating organization is being perfected so that when the physical property is completed there is an operating force ready to put it into operation at once. To do this it would require a trained crew or a complete organization such as is in charge of the property now. In order to have this operating force ready, there would have to be certain heads of departments employed about six months prior to completion of physical property. The construction costs would cover completing the track, putting the cars in the barns ready to run; the sub-stations and overhead system would be equipped and tested. A certain portion of the operating crew would be trained by and paid by the construction costs. Some of the construction men would stay and operate the property such as track men, electrical linemen, etc.

In a property such as the Duluth Street Railway (Duluth Division) the following men would be needed in addition to men paid out of the construction costs. Owing to the operation of the Superior division only 75% of the full [fol. 747] costs on certain employees should be considered in Duluth, as it would be jointly operated. In my estimate, this operating organization would require the following employees employed at the rates of pay which I will enumerate, and for the time and in advance of the actual operation which I will also enumerate:

1 general operating superintendent,	6 months	$325	$1,350
2 assistants " "	4 "	300	1,200
1 supt. Ways and Structures,	6 "	165	990
3 assistants for above,	2 "	360	720
1 car repair foreman (master mech.),	6 "	188	1,128
2 car repair foreman, assistants,	4 "	200	800
1 car barn foreman,	6 "	120	720
2 assistants to above,	4 "	200	800
2 substation operators (full time),	2 "	340	680
1 claim agent,	3 "	165	495

1 auditor,	4	months	225	900
2 auditor's assistants,	2	"	240	480
1 traffic manager,	6	"	158	948
3 " " assistants,	5	"	150	750
1 advertising man,	6	"	150	900
1 storekeeper,	4	"	218	872
1 " assistant,	4	"		
1 operating engineer,	6	"	235	1,410
1 " " assistant,	5	"	150	750
Total heads of departments				15,893

In addition to these we would expect to have:

Office supplies, 6 months	$2,000
Office rent (prior to building completion)	1,800
Misc. Expense, telephone, traveling, etc	1,500
Advertising for help	1,000
" " system	5,000
Misc. help, stenographers, etc. 6 mos. at 500	3,000
Total miscellaneous	$14,300

The complete operating force could not be picked up on an exact date, and to have this crew ready, it would require paying some of the men for a time before operation actually starts. Some would be employed three months in advance and it would probably average 2 months for all the men. There would be some men employed who would not be retained. It is assumed that nine men out of ten would stay; so 10% of this advance payroll would have to be added. The payroll would have on it in addition to the heads of Departments mentioned previously, the following employees:

[fol. 748] 35 operating men,	average wage	50c	per hour....	$120	per month.
(Car repair men) 16	"	"		150	"	"
95 (Car barn men) 79	"	"	55c	"	"	130	"	"
285 Motormen and car men.	"	"		....	120	"	"
4 Engineering Dept.,	"	"		.	150	"	"
34 General office.	"	"		...	100	"	"

35	times 120 is....	$4,200
16	" 160 "	2,400
79	" 130 "	10,270
285	" 120 "	34,200
4	" 150 "	600
34	" 100 "	3,400

$55,070 times two months is..... $110,140.

In addition to this operating labor payroll, it would be expected that this organization would make mistakes and thereby spoil or destroy a certain amount of property such as tools and materials and many other small items. This is at best an estimate, but with the present knowledge of street railway standards it could be conservatively stated at $20,000. Combining all these costs, we have the following:

Heads of departments	$15,893
Plus 10%	1,590
Office and Misc. expenses	14,300
Additional employes	110,140
Plus 10%	11,014
Tools and materials	20,000
Total	172,937
Interest on development money, 6%	1,497
Grand total	$174,434

Now I desire to state in connection with this that the employes which I have used in this memorandum constitute approximately the actual operating organization for the month of July, 1923. This total that I have computed here, as that portion of the going value represented by a cost of building up an operating organization, amounts to $174,434, and is based upon the wages paid to the employes for the first two weeks of the month of July, 1923. I have esti- [fol. 749] mated, that in round figures, the cost of building up this operating organization as of the date of the valuation in this proceeding, namely, July 30, 1921, would be $200,000. It is a fact that the wages paid employes in 1921 were somewhat above the wage rate which is now in effect. That, and other items, account for my increase of this $174,434 which is set down in this memorandum, to $200,000.

(Short recess.)

Mr. Richards: You may proceed, when you are ready, Mr. McWethy.

A. My explanation has been completed as to going value.

Q. This statement was made evidently from a close study of the Duluth Street Railway organization, Mr. McWethy?

A. Yes.

Q. It is not theoretical,—it is actual?

A. Insofar as the number of employes is concerned, and the wages which we have used in the cost of building up and operating organization, they are, as of July 23rd, and are actual or approximately so. They are as nearly actual as we could get them.

Q. You have given consideration to every class of labor?

A. Yes sir.

Q. And to the different grades of service?

A. Different grades of services—by that you mean skilled or unskilled labor?

Q. Yes.

A. We have.

Q. Clerks, and heads of departments and foremen, and each item of organization as it actually appears to be?

A. Yes sir.

Q. And it is your opinion, based upon such facts and considerations that, eliminating the element of past losses in the years prior to the time of making this order of July 13, 1922, the going concern value would be as you stated?

A. Approximately $200,000.

Q. What in your opinion would be the proper amount in per cent for the item of interest during construction, con-
[fol. 750] sidering that the property would be constructed in a period of two years, and considering interest at the rate of 6% for money actually used in such construction period?

A. The item of interest during construction, in my opinion, for the Duluth Street Railway property, Duluth Division, interest to be computed at the rate of 6%, would be 4.8% upon the value of the property before general overheads.

Q. What would it be if you figured it at the rate of 7%?

A. It would be 5.6% approximately.

Q. Please explain how you determine this?

A. I would assume that it would be necessary to purchase the land incident to this property, the land owned by this company,—at the beginning of the construction period, and that interest would be computed on the land value for the full period of two years. Considering the land value at $118,094, would give a weighted interest during construction cost at the rate of 7% of .00462. I have assumed that the track would, on an average, have to have interest com-

puted on it for one year; and that the inclined railway would be constructed in one year, and, therefore, the interest charge would be for one-half a year; that the paving construction would be spread over the two-year period approximately equally, and that therefore interest would be computed for one year of pavement. This applies also to the electrical distribution system. On rolling stock, it would not be necessary to buy the cars and pay interest on the money incident to that purchase for more than one-fourth of a year. On sub-station equipment it is my opinion that one-half a year interest would be sufficient. On shop machinery, tools and so forth, one-quarter of a year. On buildings, I would assume that they would be constructed over the full two year period and that one year's interest would be necessary on buildings. On furniture and fixtures [fol. 751] I have assumed a quarter of a year. Now averaging the amounts agreed to by the engineers, and the exclusion of land value as a weighted average, at 7% inter-st rate, and weighting the values with the number of years which I have considered reasonable, would give approximately 5.6% at that interest rate.

Mr. Carmichael: Let me see if I understand. For the items of general overheads and interest during construction you figure 5.6?

A. Yes, on a 7% interest basis.

Mr. Richards:

Q. And following the same method I assume that you have arrived at the figure of 4.8% on the basis of six per cent for money used by following the same detail of estimate?

A. I did.

Q. And did that detail take into consideration all the elements of property to be considered under the head of construction?

A. It did.

Q. Including even the purchase of land?

A. Yes sir.

Q. Assuming that the present tax rate is 5.79% on the assessed valuation of personal property,—I am not quite clear wh-ther that is in evidence or not?

The Master: I think Mr. Scott testified as to the method, I don't know about the rate.

Mr. Richards: Is there any contest,—is it admitted or is there any dispute of the alleged fact that 5.79 is the rate of taxation at present on the assessed valuation of personal property in the city of Duluth?

Mr. Carmichael: I have forgotten what the tax rate was last year.

Mr. Richards: Well we will ask the question and follow it up by proof. (To the witness:) Assuming that the tax [fol. 752] rate on the assessed valuation of personal property in the city of Duluth is 5.79% and that it is assessed at 40% of the full value, what in your opinion would be the proper amount to allow for taxes during construction?

A. On this basis it would amount to about 1.5% or to approximately $66,300.

Mr. Richards:

Q. That is, the Commission figured 2%, did it not?

A. It did.

The Master: That is, in getting your total amount, you base it on the Commission's finding and value?

A. I base it upon the tax rate of 5.79%.

The Master: But you must have taken some value in order to get this total tax.

A. This is based upon the agreed values of the engineers, of $3,605,114. That is the agreed to value, exclusive of land.

Mr. Carmichael: On what basis?

A. On the original cost basis. And the land included in this computation is as the city set it up, $118,094 which makes a total value, full value, that I have considered in this computation of $3,605,114.

Q. That was based so far as the land value was concerned, on the Assessor's actual taxation?

A. That is true.

Q. And considering the report of actual expenditure, the damages to abutting owners for constructing the incline on Seventh Avenue West?

A. That is true.

Q. Have you made a study of the actual overheads, the actual overheads experienced by the Company from the year 1910 to 1921?

A. I have made a study of the actual overhead expenses charged to construction by the Company and included in its construction charges for the period from 1910 to 1921.

Q. What did this show you to be the actual overheads in per cent of the total additions or construction work during that period?

[fol. 753] A. The total gross additions from 1910 to 1921 amounted to $1,597,292.74. Those are the gross additions and including the reconsideration—there was charged during this period for overheads both general and those items which the engineers agreed to as direct overheads a total for this period of $58,134.85. Of this amount tools amounted to $3,060.52, which was .19 per cent of the gross additions, 19/100 of one per cent. Insurance $680.82, which was 4/100 of one per cent of the total gross additions; stores and material expense $596.30, which amounted to .04 per cent; engineering and superintendence $35,620.14. This amounted to 2.23 per cent of the gross additions. Interest during construction, $2,378.54, which amounted to .15 of the gross additions. Injuries and damages $9,698.97, which amounted to .61 per cent, general officers' salaries, charged to construction, $2,098.69, which amounted to .13 per cent. Storekeepers and clerks, $4,010.87, amounting to .25 per cent. The grand total of the overheads charged to construction amounts to $58,134.85, which is 3.64 per cent of the total gross additions for that period.

Mr. Richards:

Q. I will ask you, Mr. McWethy, if the expenses that you have stated or the items you have mentioned, including the tools, insurance, stores, injuries and damages, storekeeper and clerk, are not in the items of direct overheads agreed to by the engineers?

A. They were.

Q. Do you know what was agreed upon?

A. I do.

Q. Were you in the case at that time?

A. I was in the case and had these matters explained to me at the time of the hearing before the Railway and Ware-

house Commission, and I know that there is a total of 7.3 per cent, or approximately that figure, which was allowed [fol. 754] and agreed to by the engineers for the City and the Company as what they call direct overheads which were included by them in their agreed-to figure that the item of general overheads was entirely separate and apart from the item of direct overheads, and that was one of the items which the two engineers did not agree upon.

Q. The general overhead included this matter of engineering and superintendence?

A. It did.

Q. Interest during construction?

A. Yes.

Q. And general office expenses, salaries?

A. Yes, as a general proposition.

Q. But aside from that, these other items you have here recited were with the direct overheads?

A. Yes sir.

The Master: Well now let me see if I understand you. You state that in compiling that cost of reproduction in addition to agreeing upon the unit prices for different periods, the engineers also agreed to include for direct overheads what?

A. 7.31 per cent.

The Master: And that your analysis of the total amount expended for construction from 1910 to 1921, as shown by the books of the Company, gave 3.64 as the per cent of these same items included by the engineers as 7.31?

The Witness: No, that is not true.

The Master: Then I don't understand it.

The Witness: Let me explain it. The items corresponding to 7.31 which I have just testified to are the following: tools, insurance, stores, materials, storekeepers and clerks; injuries and damages also were in the 7.31. The other items which I have just testified to, engineering and superintendence, interest during construction, and general officers' salaries were included with general overheads which the engineers did not agree to.

[fol. 755] The Master: I do not know where the comparison is unless we compare the same items with the same items. Mr. Richards, if your object is to test the sufficiency

or insufficiency of this agreement as to 7.31 for general or direct overheads—for direct overheads—you must confine it to the same items that were included in the engineer's direct overheads.

Mr. Richards: That is true, but we will do that. We intend to do that. Please split into percentages those items relating to direct overheads and that were agreed to from the general overheads not agreed to, in stating the percentage.

A. That portion of the actual overheads charged on the books of the Company, corresponding to the 7.31 per cent which the engineers estimated as direct overheads, amounts to 1.13 per cent.

Q. Exactly. Now, deducting this from 3.64 per cent above stated would leave the percentage of the general overhead?

A. Which is 2.51 per cent for general overheads.

Q. That is your experience of the company, as shown from your examination covering these years on general overhead?

A. That is the amount which the Company charged to construction during this period.

The Master: Will you give me the items now included in the direct overheads and general overheads?

The Witness: Direct, tools, stores, materials, insurance, injuries and damages, storekeepers and clerks. Included in general overheads, engineers and superintendence, interest during construction, general officers' salaries.

The Master: Now, the direct amounted to what per cent?

The Witness: The direct amounted to 1.13 per cent.

The Master: And the general?

The Witness: The general amounted to 2.51 per cent.

[fol. 756] The Master: Now, if the assumption of the complete reconstruction in the beginning were to be carried out, would these percentages which you have found as additional expenses incurred by the Company, for additional construction to a going plant, represent your best judgment as to what the first cost would be?

A. It would not.

The Master. What relation do you consider the percentages which you have derived from the books in the manner

you have stated, bear to the overheads incurred in a new construction?

The Witness: Well, considering this evidence which I have just presented, and which I had before me at the *time* I made up my report to the Commission, which is Exhibit BB before this Court, and considering all other evidence which was presented before the Commission, I agreed with the engineers that 7.31 per cent should be allowed as the direct overheads on a cost of reproduction theory, and that general overheads in addition should be added, varying with the basis of valuation 13.3 per cent on the 1915 and the investment basis; 14 per cent on the ten-year average basis, and 16½ per cent on the present-day basis or the 1921 basis. The difference in these figures being necessary in my opinion because of the fact that on the ten-year average basis and the 1921 basis it would be necessary to make greater allowances for legal administration expenses, taxes and interest during construction.

The Master: The general 13.3 per cent——

The Witness: On the 1915, and the investment basis.

Mr. Mitchell: What did the Commission actually use?

The Witness: Fourteen per cent on the 10-year average basis, and on the 1921 basis 16½ per cent.

Mr. Mitchell (continuing): Your analysis of the books of [fol. 757] the Company shows the amounts of these overheads, direct and general, which the Company charged into its investment account?

A. That is true.

Q. And if, as a matter of fact, the Company charged too small an amount into its investment account and too large an amount into its other expenses then the result would be that the book cost of this property would be too low?

A. That is true providing that were the only element of error in the book cost.

Q. Well, I am speaking now only of that one point.

A. That is true.

Q. If the Company, at the time this work was done from time to time, charged too small an amount of these overhead expenses into the investment, then the balance of those costs went necessarily into its operation expenses?

A. That is true.

Q. And the result was that if an error of that sort was made for that period, the operating expense was high and

by the corresponding amount the additional investment was low?

A. That is true.

Mr. Richards: That is, if the Company charged too small an amount necessarily the operating expenses were put too high?

The Witness: That follows:

Mr. Mitchell: I will have to admit that I did not know that.

Mr. Richards:

Q. I gather then, that your analysis here showing that the general overhead charge, in the actual experience of the Company covering that time, put at 2.51 is in a way comparable to the 14 per cent allowed by the Commission?

A. Yes, except in amount.

Q. And that the 1.13 per cent is intended to be comparable to the figure of 7.31 indicated by you as direct over heads agreed to?

[fol. 758] A. It is.

Q. Now, this indicates the actual overheads according to the actual development of the property, does it not?

A. For a twelve-year period.

Mr. Mitchell: You mean as recorded on the books of the Company?

The Witness: Yes.

Q. Is there any reason to suppose, so far as you know that the same actual percentage would not apply to the previous development of the property from 1900 on?

Mr. Carmichael: May I ask what the attorney means by the question, what the books show and what actually went into the property?

Mr. Richards: He has figured that the construction of the property to 1900——

Mr. Carmichael: We object to the question as indefinite then.

The Master: Objection noted.

Q. But your examination does show the method of annual increase and development of the property, does it not, Mr. McWethy?

A. My study shows—if by increased development of the property you mean net additions and gross additions of the property?

Q. Yes.

A. My studies show those.

Q. Your total show- that?

A. Yes.

Q. What is your reason to suppose that this actual experience of the Company from 1910 to 1921 would not be approximately the same as in previous years?

A. I don't know that it would and I don't know that it would not.

Q. As I understand you, you were stating that your esti- [fol. 759] mate of overheads generally total, on the theory of 1915 prices and investment basis, would be 13.3 per cent?

A. It would.

Q. That is on the theory of reproduction of a new property?

A. Yes, on that basis.

Q. But if you are dealing with a property that was developed and spread over a period of years would you use any such basis, piecemeal construction?

A. I believe, were I considering the valuation of property based on the theory which you stated and not on the reproduction cost theory that I would use overheads for this property very close to the overheads which the Company shows.

Q. That would be as applied to additions 2.51 per cent?

A. Yes, providing that same percentage was found by me by my investigation to extend over the whole period of construction.

Mr. Carmichael: You have no doubt but what in the Company's experience that the percentage of overheads that you have stated in your report, might have been charged to operating cost rather than capital account?

The Witness: No. I understood that the Company experienced such overheads, but the cost to reproduce this property under a theoretical cost of reproduction, the overheads which I have included in my report would be applicable, if I were to reproduce this property.

Mr. Carmichael: Then it is your opinion that in the creating of this property these overheads existed as an element of cost?

Witness: Certainly, certainly.

Mr. Carmichael: In the amounts that you have set up in your Exhibit BB?

The Witness: As I stated, Mr. Carmichael, I do not believe that the actual cost to the Company has been the general overheads that I have set up in my report. I think that were the actual cost to the company to be determined [fol. 760] it would be nearer the general overheads which I have found on the records of the Company.

Mr. Carmichael: I am speaking, Mr. McWethy, to create this property on any of the four bases you have used, those overheads would be encountered in the same way that you have set them up in Exhibit BB.

The Witness: That is on reproduction cost theory,—I am in agreement with you.

Mr. Richards: I will ask you this question then: if the overheads are to be based on the experience of the Company as it was developed, piecemeal, what would you say as to the proper percentage for overheads?

A. I believe that that is a little difficult question to answer because I have not made investigation of the accounts of the Company previous to 1910. To make such an estimate, it would be necessary to make an investigation of the accounts previous to 1910 and back as far as any records were available, and if possible to the inception of the Company.

Q. If you can state that approximately, all right, but if you cannot, we have more time to investigate this.

A. I can say this that were I to consider that part of the value which has been added since 1910 I would add approximately 2.51% to the value of the property as approximating the general overheads actually experienced by the Company for that period. Now as to what general overheads were actually applicable for the property now in existence, but constructed previous to 1910 I am not in position to say.

Q. No, all right. I will ask you, then, to investigate that for further discussion, if you please.

Examined by Mr. Mitchell:

[fol. 761] Q. Do you need such an investigation to determine whether or not it has charged a proper amount to construction and a proper amount to operation? Would not any attempt to express an opinion on what you are now asked to do require consideration of that question, as well as simply an examination of the books?

A. Yes.

Q. Now at the time when the company was operating under contract rate and no supervision of its accounts, there was not the same necessity for keeping accurately investments separate from operating expenses, and could you make answer to the sort of question you are now asked?

A. I think it would be very difficult, Mr. Mitchell.

Q. You have either got to assume that the Company made the proper division or you have got to undertake to determine that yourself?

A. I have got to. If I did not assume that the Company made the proper division, I have got to analyse both the operating and construction accounts, and make the division for myself.

Q. And you have got to determine whether or not in any given construction job, the proper amount for the general overheads, salaries, supervision, and all that sort of thing, has been charged into investment account, or whether it has not?

A. I think that would be particularly applicable to the period previous to 1910, for ever since 1910, or approximately since 1910, the Company's bookkeeping methods have been such that I would probably make very little adjustment in the Company's charges to construction to general overheads.

Q. Still you would not be willing to testify that it is your opinion the Company had made the proper division, with-
[fol. 762] out some testing—without testing it to some extent?

A. Do you mean since 1910?

Q. Yes.

A. A certified public accountant from our office made this examination of the general overheads and it is my opinion that he agreed with you in the charges that you made in the operating expenses for those items.

Q. Well do you know whether he was required to do anything except to determine what books—what the books showed?

A. Perhaps a more detailed analysis might show some adjustment made, but I believe they would be inconsequential. He, it is true, took off from your books what you actually charged. His instructions were to investigate so far as he could also the reasonableness of the charges which you had made to overheads.

Q. Then this investigation that you speak of was made by this accountant rather than by you?

A. It was made under my direction by this accountant.

Q. But what you have said here refers to the distribution of these costs made by the Company during that period?

A. Yes sir.

Mr. Richards: This period you are speaking of now is what?

A. 1910 to 1921 inclusive.

Q. Do you know what the Superior Street job—how they arrived at the charge of 5% of engineering and superintendence paid to property owners——

Q. This investigation includes the data up to the end of 1921. As I remember it the Superior Street job was in 1922.

Q. It has been going on several years?

A. I have no information on that point.

Mr. Richards: I would like to have Mr. Warren's counsel [fol. 763] produce the contract I called for in relation to revenues from advertising and so forth.

(Mr. Mitchell hands paper to Mr. Richards.)

Mr. Richards: I would like to call Mr. Warren for further cross-examination.

[fol. 764] HERBERT E. WARREN, recalled, testified:

Mr. Carmichael: We might offer these two exhibits, exhibit 37 and 38.

The Master: Any objectioin to these exhibits?

Mr. Richards: We want to ask Mr. Warren one or two questions on them.

Mr. Mitchell: It may be advisable to ask Mr. Warren certain general questions that will make these exhibits, and also those already offered, competent.

Mr. Mitchell:

Q. You are now and have been for how long—thirty years—the general manager of the Duluth Street Railway Company?

A. I have.

Q. And during all that time you have been in charge of all the operations, including its books, which show the results of its operations.

A. I have.

Q. And during all that time you have been familiar with its books and know the manner in which they are kept?

A. Yes.

Q. You may state whether or not they have been kept, at least since 1900 in accordance with the rules of the Interstate Commerce Commission and kept accurately.

A. They have been kept in accordance with the rules of the Interstate Commerce Commission from about 1900, I don't remember the date, since that time, and have been kept accurately.

Q. Do those books show accurately all of the items making up the income and outgo of the company?

A. Yes they do.

Q. Including everything received on account of transportation of passengers or from any other source?

A. Yes they do.

Q. And everything paid out on account of operation expenses, construction, or for any other purpose?

A. Yes they do.

[fol. 765] Q. Those records are kept in a number of different books?

A. Yes, in a very considerable number of books.

Q. You have already produced and there has been identified and introduced in evidence a number of exhibits prepared under your supervision from those books?

A. Yes.

Q. You now have in your hand Exhibits Number Thirty-Seven and Number Thirty-Eight?

A. I have.

Q. Have those also been prepared under your supervision and from the books of the company?

A. They have been.

Q. And has the company from time to time furnished reports from its books to the Railroad and Warehouse Commission of the state?

A. It has for one or two years.

Q. And since it has been under the supervision of that Commission?

A. Yes.

Q. Has the Commission had access to your books and has it caused investigation to be made of your books.

A. It has had access to them at all times and has had some investigation.

Q. Have you since the hearing before the Master began had the books available for access by all representatives of both the City and the Commission?

A. Yes, at all times.

Q. Have those representatives actually examined and made some investigation of the books?

A. They have.

Q. And have all the accounts been available for their examination?

A. Yes, sir.

Q. Have the Exhibits Thirty-Seven and Thirty-Eight, which you now have in your hand, been delivered (copies of those) to the attorneys for the Commission, and for the City some days ago?

A. They were delivered by us to the Engineer for the City some days ago.

[fol. 766] Q. Something more than a week ago?

A. More than a week ago, I would say it was nearer two weeks. Shortly after the previous adjournment of these hearings.

Q. And has the Engineer of the City, since that time, made such investigations as he cared to of those books, in connection with these accounts?

A. I assume he has, he has had every opportunity, he has made some investigations and been in the office.

Q. And the books have been open to him?

A. Yes.

Q. You gave him such assistance as he desired?

A. We have.

Q. And have the books during all of the time been available for representatives of the Commission?

A. They have.

Q. And the books are now available for the representatives of either the City or the Commission?

A. They are.

Mr. Mitchell: With the exhibits already in evidence made from the books, either have been received or with this evidence be received as qualifying those exhibits,—is there any objection to having it handled that way?

Mr. Carmichael: We now offer the plaintiff's exhibits thirty-seven and thirty-eight.

Mr. Carman: I would make the same objection and the same admissions as were made generally to the exhibits referred to in the last statement of counsel. That is, we admit that they accurately reflect the books. We do not admit that they are proper in other ways. We do not admit anything except that they reflect the books in that they actually show the book entries of the company.

The Master: You don't object to it as being mere tabulation from the books?

Mr. Carman: No, no, there is no objection to that. We do not call for the books to be produced on that score. We [fol. 767] admit that they show the book entries, but we do not want to be considered as admitting the propriety of the items.

The Master: Then they will be received subject to the objection.

Mr. Carman: And this we understand includes the book entries exclusively, not estimates,—they don't include any estimates?

Mr. Carmichael: The books do not include any estimates.

Cross-examination.

By Mr. Richards:

Q. Mr. Warren you have furnished to me this morning or at this time copy of a contract made between the Street Railway Company and one Barron G. Collier, Inc., dated August 8, 1918. My examination shows that this is made to cover a period of fifteen years, expiring the 31st day of

December, 1933. My examination shows that there is a minimum payment to be made to the Company by the second party, the Collier Company, of $7,000.00 per year, with additional rental of $52.50 per year per car, in case there are more than 130 cars operated. I will ask you if that is still in force?

A. It is.

Q. And has it been modified?

A. Yes, an amendment or the supplemental agreement made.

(Papers marked City's exhibits N and O.)

Q. Showing your City's Exhibit N I ask you if that is the paper that you just furnished the City on request?

A. It is.

Q. And I will ask you if it is a true copy of the original agreement?

A. It is.

Q. I show you the City's Exhibit O and ask you what that purports to be?

[fol. 768] A. That is a copy of the supplemental agreement with Barron G. Collier Company covering advertising space in the cars.

Q. And I will ask you now if both these agreements are still in force, City's Exhibits N and O?

A. They are.

Q. And are there any modifications, oral or otherwise, to these agreements so far as you know?

A. None with the possible exception of some slight modification as to the use of some of the frames.

Q. There is no agreement or arrangement whereby either party has a right to terminate the contracts?

A. None unless it is expressed in the contract that I know of.

Q. Then it appears that in 1918 the company tied itself up to a fifteen-year contract for rental of its advertising car space?

A. It made a contract at that time running into 1933. It did not consider it as tied up. We thought it was a very desirable contract from the company's standpoint.

Q. With whom had you any similar arrangement prior to that time?

A. With the George Kissam Car Advertising Company. I believe that the Barron G. Collier Company are successors to the Kissam Company.

Q. That is, the main interest being the same?

A. If I am not mistaken that is so.

Q. And how long had that arrangement with Kissam Company been in force prior to August 8th, 1918?

A. I do not now know, but for a number of years.

Q. Can you approximate the time?

A. I would say for ten years at least.

Q. That would relate back to 1908?

A. Yes, it was probably longer than that.

Q. Had you rented out those advertising spaces subse-
[fol. 769] quent to the organization of the company in 1900 to any other parties than this Kissam, before?

A. I do not recall that we had.

Q. So then practically your dealings all have been with the same people, as you explained, from 1900 to the present time?

A. Yes.

Q. And did you have a written agreement with the Kissam people operating under that name?

A. Yes, we did.

Q. Can you produce that?

A. I presume I could find it in our files.

Q. Will you do so?

A. Yes.

Q. Do you keep posted as to the charges made for advertising space in the cars of the Street Railway Company?

A. I do not.

Q. Have you at any time since this contract was made?

A. I have at times had some knowledge of the charges made by the advertising companies.

Q. Was the amount that the company was to receive through this contract with Collier an increase over the amount specified in your contract with the Kissam people?

A. It was increased very materially.

Q. You do not consider it any concern of the company to investigate as to the values of the contract at the present time?

A. Why, it has not occurred to me to investigate as to the value of it. It was the contract——

Q. You consider you are bound by the terms of it and have no interest in the actual value or revenue producing qualities of your street car company on advertising points?

A. Well, that is two questions. I consider that we are bound by the terms of the contract. I do not know that I consider that we have no interest in the value of it. I do not think that is true, but it is true that we are bound by the terms of it.

[fol. 770] City's Exhibit P produced by the complainant.

Q. I will ask you about this, Mr. Warren, this is a true and correct statement as appears from your books?

A. It is.

Q. To what particular fund or branch of your bookkeeping do you accredit these particular securities specified in City Exhibit P?

A. I think that those constitute the securities that are shown in the list of non-operative income as constituting securities from which the income from funded securities is derived.

Mr. Mitchell: Non-operating income?

A. In non-operating income.

Q. I am asking you to what particular fund or portion of your balance sheet this is accredited to, this interest, and these bonds?

The Master: These are not included in the rate base.

Mr. Mitchell: No.

The Witness: I think this constitutes all the funded securities owned by the company.

Mr. Mitchell: These are included in the rate base and the income is not shown in the operating income?

A. That is correct.

Q. You have not made a calculation of the total?

A. No.

Q. It is approximately $315,000.00?

Mr. Mitchell: $323,538.00 subject to correction.

Q. Now, to what fund does this total investment belong, in whole or in part?

A. This list includes all securities owned by the company with the exception of those belonging to the General Mortgage Trust Fund.

Q. And those that belong to the General Mortgage Trust Fund amount to what?

The Master: There is another question you asked there, [fol. 771] how these were accrued.

Q. Yes, that is not answered yet.

A. To give you the exact amount I will have to consult some memoranda. It is something like $275,000.00—$279,000.00 or $278,000.00.

Q. I will pass that at the present and you may answer the question explaining there among what funds, in whole or in part, are these $323,538.00 of securities credited, or to what do they belong?

A. They are not allocated to any particular fund.

Q. Did they come from past earnings, or from depreciation reserve?

A. It would be impossible for me to say or to allocate the source.

Q. Then are you ready to state the amount of other securities that you say are accredited to the general mortgage fund?

A. I stated that approximately.

Q. What was the amount?

A. $273,000.00—$275,000.00, I know it was in that neighborhood, $273,000.00 I now recall the amount.

Q. So that the total securities that the company have is approximately the addition of those two sums $323,538.00 and $273,000.00?

A. It would be.

The Master: Do you include in those securities belonging to general mortgage fund the $181,000.00 of your own bonds?

A. We do not.

Q. Well, that last item that the Master asked you about if not covered in any of this detail of the $323,538.00?

A. The Master refers to the unsold bonds in the treasury, I presume.

The Master: Mr. Robertson, as I remember, testified that of these general mortgage bonds, $181,000.00 had been certified and were still held by the company.

Mr. Mitchell: They are not included in these lists.

The Master: But they are included in the general bonds [fol. 772] that have been certified?

Mr. Mitchell: Yes, I assume they would appear on the balance sheet, both as a liability and as an asset.

Q. So the total available asset would be the amount of these three figures, $323,538.00 and $273,000.00 and $181,000.00?

A. If you call $181,000.00 available assets.

Q. You could not at the present time make any estimate of that $323,538.00, you could not tell its source, or could you by further investigation?

A. I don't think anyone could, I don't know how it would be determined. It is a matter of separating the debit and credit items on two sides of a balance sheet.

Mr. Mitchell: Well, there is no mystery about where the money came from. It is an accumulation over a long period of years?

A. Yes.

Mr. Mitchell: It was not paid out in dividends but it has been from time to time invested,—that is true as to the $323,000.00. The $223,000.00 is the proceeds of certain bonds which were required to be sold and kept as reserve or emergency funds under the trust deed of the general mortgage?

A. That is true.

Mr. Mitchell: But as to the $323,000.00 that is simply an accumulation over a long period of years, over the life of the company, from earnings that have not been paid out in dividends?

A. When I say I cannot say I cannot tell where they come from, it is equivalent to asking, if we have two five dollar bills in the cash box, where it came from.

Mr. Mitchell: But you know they all came from the earnings?

A. Yes.

Mr. Mitchell: And they have not been paid out by way of dividends.

[fol. 773] Mr. Richards: Mr. Warren, I would like to have you furnish us with a statement of car miles operated in 1922 and 1923 by months. Can you do that?

A. Yes, we can do that. I think I have a memorandum of it.

Mr. Richards: We will introduce it as a part of Mr. Warren's cross-examination.

(Exhibit 39 is *with* withdrawn and is marked City's Exhibit Q.)

Mr. Richards: We offer in evidence Exhibit Q as part of the cross-examination of Mr. Warren.

The Master: Received in evidence.

Mr. Richards:

Q. I call your attention to the showing here made by you in City's Exhibit Q, of the number of car miles operated by the company in 1922, the first seven months, and I figure that that makes a total of 1,843,545 car miles; is that correct, 1,843,545?

A. I don't understand your question. The total is shown on the exhibit.

Q. I mean the first seven months only of 1922.

A. I make it 1,843,545.

Q. And you have stated in this exhibit that the car miles operated for the first seven months in 1923 were 2,155,752?

A. Yes.

Q. There was no change in the local schedule as prescribed by the City Council during this time?

A. No change in the local schedule nor in the base schedule of the company except two slight changes, on Park Point, on the order of the Council, asking for increased service.

Q. Where was any increased service asked for by any order of the Council as covering the first seven months of 1923?

A. In the fall of 1922 there was a resolution of Council [fol. 774] ordering increased service on the Park Point Line or ordering a continuance of the summer schedule throughout the winter, something that had not previously been done. Later there was another one ordering a late car run daily.

Q. To what extent did those two things affect this increase in car miles?

A. Not very greatly, perhaps ten thousand miles a year.

Q. And that would be seven-twelfths of that for seven months?

A. Yes, but that would apply mostly to the winter months.

Q. So it would not operate——

A. I would say that ten thousand during the winter, that would be my impression.

Q. Aside from that, the increase in car miles comes from what source, or what cause?

A. It came from the running of more extra cars. There was a decrease in the car mileage until the latter part of 1922, and a very material decrease during the year 1922. There was, during 1922, comparatively less extra car mileage run than there had been in previous years.

Q. It is a fact, isn't it, that in 1921 you had 3,283,232 car miles operated?

A. The total car miles for 1921 was 3,283,232.

Q. What is the total car miles for 1922?

A. 3,234,232.

Q. Isn't it a fact, Mr. Warren, that the extra car miles shown in the City's Exhibit Q as a part of your cross-examination, which appears to be 312,207, by subtraction,—with the exception of that item of approximately 10,000 that you accounted for in the Park Point and otherwise,—accrued and was occasioned by the necessity of meeting the jitney competition alone?

A. A very considerable part of it was with a view to providing more adequate service where there was considerable jitney competition; and that there was jitney competition there, undoubtedly did have some effect on us in putting it on. The situation in regard to that mileage was [fol. 775] this: Just previous to the holiday season in 1922, there was more or less complaint of the long headway on the West Third Street; that is, the long space between cars. We found that in that section there was much less service in proportion to traffic than in any other section of the city; that cars were carrying a great many more passengers, and the wait was long, being ten minutes; and it is true that in that section jitneys were leaving Superior Street; and going to that section because that was the best place for

them to work. And we believed that those people up there were entitled to more service. They were discriminated against, had less service than other parts of the city. We felt that we could not change the established schedules; we had always run more or less "tripper" service, extra service morning and evening. In this case we were worried about it, and I consulted Mr. Mitchell, and told him the situation, and he thought it would be perfectly proper that we should put on more service up there at what we call the non-rush hours. We had the men, and had the cars, and the service that was added was entirely in the non-rush hours; that is from about eleven in the morning until about 3:30 or 4 in the afternoon; it merged with the rush hour service at that time; there was no addition made at the rush hour.

Q. That is, the service put on related to the West Third Street?

A. Yes, that is where the most of it was put on.

Q. But that was not the only place you put on extra service in order to meet jitney competition?

A. That was the only place where we made any particular change at any one time, in what we call the "tripper" or extra service, cars that make a trip or two trips. We are constantly changing and always have had to change the service at the rush hours. That is the change, I should [fol. 776] say, monthly. We keep a constant record of the number of passengers carried by trips and we attempt to adjust the service to the needs of the traffic, and while we felt that we could not adjust it in the base schedules here, which had been fixed by the Council, we did adjust it in the extra cars that should run, not the schedule cars.

Q. Of course that involved extra operating expense?

A. Some extra operating expense, not so much as it would have been if those cars had not been run at the off-hour, the noon rush period—and I have no doubt but that the additional expense involved in running those cars at that hour was more than made up by the additional passengers carried on that section of the line. I think particularly in view of the jitney competition that was there then, we would have carried fewer passengers and the extra service perhaps was not put on at any sacrifice in net income.

Q. I would like to have you show that by reference to a detailed report of revenues, Mr. Warren, as compared to expense. You have those figures?

A. No I have not any report that would show detailed expense by line.

Q. Or revenue passengers—you have reports that would show revenue passengers?

A. We have such reports that are compiled quarterly.

Q. You have just stated your opinion that the additional revenue more than accounted for the additional expense on that proposition. We would like to have you produce the records in regard to the revenue passengers, covering those periods and at that point.

A. The only thing we have in the way of such records would be records—would be records which, as I say, are [fol. 777] compiled quarterly, which show the number of passengers carried in various sections, and we could show the number of passengers carried at various times, once a quarter, upon the West Third Street branch. I do not believe it would be possible to show the expense for that section, separately, I do not think that could be ascertained.

The Master: What is the understanding about this? Is Mr. Warren to prepare an additional paper?

Mr. Richards: We would like it.

Mr. Carmichael: We don't know whether the exact information is available. Mr. Warren has stated that additional service was more than offset by the additional revenue. I don't believe he has any records that could be prepared to show that.

A. There could be no record that would show what additional revenue resulted from the change in extra cars.

Mr. Mitchell: Did you keep yourself informed as to whether these extra cars were being well patronized?

A. Yes, and I have something here that might be of interest to Mr. Richards, a memorandum that shows the number of passengers per car in those cars before and after the change.

Mr. Richards: That is what we wanted.

A. Yes, I have that.

Mr. Carmichael: You would have to compare that with some of the other lines in the city to make a comparison.

Mr. Richards: Meanwhile, I will ask you this question, Mr. Warren. This extra service was not contemplated at the time the Commission's order was made.

A. It was not contemplated until November, it was not put on until the end of November.

[fol. 778] Q. After the jitney competition had made itself felt?

A. The jitneys were then leaving Superior street and going to Third Street.

Q. But as you stated, not to the extent of—within two thousand passengers per day of what they are now?

A. Well that two thousand passengers per day was an estimate of the total number of passengers carried by jitneys in all sections of the city.

Q. That is, it was put at 600 per day in April, 1922 and 2,600 after that and at the present time.

A. I do not recall that. I have a memorandum here showing that on the section of line in question. There was being carried during the entire day in July on each half trip, or one way trip——

Mr. Richards: What year?

A. 1922—44.5 passengers as compared with the highest number in any other section of the city of 37.4 an average of perhaps 20 on that section were being carried 44.5.

Q. That is West Third Street?

A. Yes.

In October there was 41.1 as compared with the highest in any other part of the city of 33.6. In January 1922 it was 42.8. In April 45.4. In July 44.3 and 39 in October. The number carried on any other section of the city remained about the same and in November this additional extra service was put on and that reduced the number carried on that section to 32.5 for half trips as compared with 35, 34, 33, 32, 27, 26 and 23 and lower figures——

Q. Can't you furnish those tables to Mr. Gifford?

A. I can.

[fol. 779] The purpose of reading this was to show that at the time we put the number carried on the same street increasing the service at non-rush hours and it still remained as it was in other sections of the city. It was somewhat less than it had been, before the extra service was put on. How much that was affected by the change I cannot

say. I will furnish the tabulation to Mr. Gifford during the adjournment.

Mr. Richards: Now I will ask you in regard to a detail of your law expense for the year 1923, actually paid for law expense to July 31, 1923 for the year ending July 31, 1923, or can we have that furnished?

A. At some time tomorrow or next day.

Mr. Richards: And if convenient separate that into two parts so that the part for 1923 may be particularly—may be treated separately. No further tables are called for us by us.

Mr. Carman: In the Company's Exhibits here wherein taxes for the year 1922 are set up, you have in all cases figured a federal income tax of $12,070.27 have you not?

A. In cases only where the 1922 revenue is figured at the straight six cent fare.

Q. That is in cases where you have computed for revenue exclusive of the income taxes to be—$222,306.76?

A. I don't recall that figure.

Q. Will you read the answer previous? (Last answer read by the reporter.) As a matter of fact, the actual federal income tax which the company has paid out for the year 1922 has been a little over $800 hasn't it?

[fol. 780] A. I don't know that I have the amount here of the actual tax paid out in 1922. That would be for the year 1921 and I would say this that the income tax as shown in all our statements show the amounts accrued to meet the income tax, and that in some years it has been a little too much and in some years too little and they have been adjusted so that the accruals and the actual payment in the long run would be exactly the same.

Mr. Mitchell: We talked here about the federal income tax. There is also a capital stock tax paid to federal government. Do you include that in income tax?

A. We do not.

Mr. Mitchell: Where is that?

A. That is included in other taxes.

Mr. Mitchell: That is a dollar a thousand on the assessment value?

A. Something like that.

Mr. Carman: Can you get before the next session, and be prepared to show us, the actual amount of money paid by the Company for federal income tax for the year 1922?

A. Yes—you mean paid in the year 1922—for the year 1921?

A. Yes. Well, for whatever time—what I am trying to get at is the amount actually paid out. You may show, of course, every time what it was paid for. In figuring your depreciation reserve before the time the Commission made its valuation as set forth in the order that is now attacked in this proceeding, you used as the basis for computing your depreciation reserve, the Burch-Pillsburg valuation of 1910, plus actual capital investments added to that down to the time when you were figuring your depreciation reserve?

[fol. 781] It is true for some of them—for some of the computations. I do not think we used it for all of them but we did in some of them.

Q. What other basis did you have to figure the depreciation reserve on?

A. Well, we would have nothing else except an estimate of the original cost.

Q. The Burch and Pillsbury valuation is the valuation that is referred to in the City's Exhibit C, a statement made to the Minnesota Tax Commission?

A. Yes.

Q. And introduced in evidence in the early days of this hearing. That is all.

[fol. 782] Duluth, Minnesota,
September 10, 1923—10 o'clock a. m.

Pursuant to adjournment the patries met and the following proceedings were had:

HERBERT E. WARREN, recalled, testified as follows on cross-examination:

By Mr. Carman:

Q. Have you the exact amount of the federal income tax actually paid by the Company in the year 1922?

A. I have.

Q. What is that amount?

A. $13,008.24.

Q. And what was that tax for, what income was it, was it for the year 1922?

A. That was on the income of 1921.

Q. Now was that for the whole system, or for the Duluth Division?

A. That is the portion that was paid for the Duluth Division, and I believe it was also the amount for the whole system.

Q. That was taxes upon the taxable income of the Duluth Division for the year 1921; is that right?

A. Yes.

Q. Federal income tax only?

A. Yes.

The Master: I thought you said that was for the whole system.

A. I said I thought it was for the whole system, but I am not sure about that.

Mr. Carmichael: The Superior was operated in the red, was it not?

A. It was at that time, and that is why I thought this was the entire tax.

Mr. Carman:

Q. How was that $13,008.24 computed, upon what?

A. How was it computed?

Q. Yes. Upon what was it computed? How was that figure arrived at for the federal income tax?

[fol. 783] A. It was computed upon the net income for 1921.

Q. And at what rate?

A. I suppose a rate of 12½%.

Q. Isn't it a fact that for the year 1921, 12½% was not applicable?

A. It may be, Mr. Carman.

Q. Didn't the 12½% rate become applicable in 1922?

A. I believe it did.

Q. And in 1921 you had a system by which you deducted $5,000 and paid 10% on the balance?

A. I am not clear on that now, I would have to refer to the income tax returns.

Q. You cannot now give me any of the detail other than as you have stated?

A. No, I could not. I have nothing except the amount.

Q. Now I will ask you if in the report made to the Railroad and Warehouse Commission for the year ending December 31, 1921, you reported an operating income of $185,860.30?

A. I presume that is correct, if it is in the report to the Commission. It seems to be about the amount.

Q. And that is shown on page 301 (30?) of the report?

A. Yes.

Q. And you reported an interest on the funded debt of $125,842.50.

A. Yes.

Q. Now that would leave as the total amount upon which to compute the federal income tax, that is exclusive of your non-operating income, $60,017.80 wouldn't it?

A. In getting the difference between $185,860.30 and $125,842.50?

Q. Yes, the amount on which you had to pay?

A. Yes.

Q. Can you explain any way in which the federal income tax of $13,008.24 would accrue on this $60,017.80 of the net taxable income of the Duluth Division exclusive of its non operating income?

A. I cannot explain it fully and completely without reference to the income tax return. I might say, however, that [fol. 784] in paying the income tax the non-operating revence is included and there may be some deductions that are not shown in our return.

Q. The non-operating revenue is included you say, in the $13,000?

A. Yes.

Q. Your report to the Commission shows, does it not, what the non-operating income was for the Duluth Division for the year 1921? What is that amount?

A. $20,595.64.

Q. That amount added to the $60,017.80 then, would be the total base upon which the income tax would be computed on that property would it not?

A. I would think so.

Mr. Carmichael: I don't think that is quite accurate, Mr. Carman.

Mr. Carman: What are the true figures?

Mr. Carmichael: Mr. Warren says he cannot tell until he looks at the income tax statement.

Mr. Richards: We don't particularly want that, if you don't care to make plain the discrepancy of several thousand dollars.

Mr. Mitchell: We are not going to leave any apparent discrepancy, because there is none in fact, and we will show it.

Mr. Richards: That is what our question called for.

Mr. Mitchell: We have told you how much it paid and have explained why it was paid.

Mr. Richards: Will you please furnish the income tax return for both 1921 and 1922 with the figures on it this afternoon?

The Witness: Yes.

Mr. Richards: We will leave this at this time, but one other question on this same subject: in your complainant's [fol. 785] exhibit 37, a statement of the operating income for the calendar year 1922, you say at the bottom of the page, "taxes assignable to railway operations, $92,684.47," do you not?

A. Yes.

Q. And that includes both the state taxes and the federal income tax assignable to the Duluth Division?

A. Yes, and somewhat more for the federal income tax, because in this account, in this case, the federal income tax was computed on a straight six cent fare. It is the amount that would be accrued on a straight six cent fare for that period.

Q. I understand it to be on the six cent fare only from the time the six cent fare was in effect.

A. It was computed on a six cent fare from August on.

Q. Then that would mean for the actual time six cents was in effect.

A. Yes.

Q. So that that reflects tthe actual tax that you expect to pay on both state taxes and federal income tax on all your property assignable to the Duluth Division for the year 1922?

A. That would be the amount of tax that would accrue.

Q. And it also includes the capital stock tax?

A. Yes.

Q. Now it is a fact that under the state law you don't have to pay the personal property tax for the year 1922 until the end of February 1923?

A. That is correct.

Q. And you don't have to pay your real estate taxes for the year 1922,—any of the taxes,—until May 31, 1923, at which time you pay one-half of the 1922 taxes, and on October 31, 1923 you pay the balance of your real estate taxes?

A. That is correct.

Q. Your federal income tax for 1922 is payable in installments during 1923?

A. Yes.

Q. And when are those quarters due?

[fol. 786] A. I believe one is due next month.

Mr. Mitchell: We have got to pay it this week.

Mr. Richards: Let us get the dates, March 15, June, September, December—the accumulation to pay these 1922 taxes is complete on the last day of the year 1922, on this theory of operating return.

A. I believe that would be accrued, that the liability would be complete at the end of the year, or we endeavor to do that.

Q. That being the fact, the company gets the use of this accrual for taxes during the various parts of the year of 1923 covered by my previous question as to when the tax must actually be paid?

A. That is true, the income tax.

Q. It is a fact that the company is able to use this accrual for tax purposes either in aid of its working capital or otherwise, up to the time that the tax payment must actually be made?

A. The money is kept in the company's general account.

The Master: Do you mean the amount of taxes required to be paid in the year 1923 for the taxes accrued in 1922, that they are carried as reserve for taxes—that the amount held by the company is sufficient to cover it?

A. It may not be at all times.

Mr. Mitchell: But that stands as a liability.

A. It stands as a liability, and they may or may not have the funds on hand.

Mr. Richards: Wouldn't that ultimately reduce the necessity for money in the working capital, the fact that you have such accrual in reserve, accumulating?

A. Perhaps to that extent.

Mr. Richards:

Q. Wouldn't that also apply to the insurance, accrued?

A. Insurance is paid in advance that necessitates more working——

[fol. 787] Mr. Richards:

Q. Isn't that same policy of accural and reserve applied to the amount of injuries and damages?

A. No, I would not say that it is. We cannot tell when we will — amounts for injuries and damages.

Q. Wouldn't that apply to depreciation reserve account?

A. Why, I think we have stated a good many times just how we have handled our depreciation reserve account. We have no fund in it at all, we keep no funds for that purpose.

Q. But it is deducted from operating expense and taken from the earnings?

A. Yes, and set up as a liability, but there is no money on hand, no fund kept.

Q. You don't need it for construction, betterments. What do you do with it anyway when you get it?

A. We do use it for construction and betterments.

Q. For replacements?

A. Yes.

Q. Renewals?

A. Yes.

Q. But those are variable in amount, and don't you have funds on hand from your collections charged to depreciation account, that puts money into the bank?

A. No, none whatever.

Q. You deducted about $135,000 in the twelve months subsequent to the making of the Commission's order?

[fol. 788] A. Yes, that was a liability.

Q. From your earnings?

A. Yes.

Q. Did you set it aside?

A. No, we didn't set it aside. We merely set up a liability on our books.

Q. Hasn't it been your custom——

A. We do not have any set fund, we do not keep that money distinct or separate from any other funds. Merely have the liability, that is all.

Q. This money that you collect from the people, and which goes into the bank, I want to know what you do with it?

A. The liability represents money, yes.

Q. It goes into the bank doesn't it?

A. Money goes into the bank, yes, and comes out again.

Q. For what purpose?

A. For all the various purposes that money is used for in the operation of the street railway.

Q. Do you consider it working capital?

A. Hardly. It would be the reverse.

Q. It serves all the purposes of a working capital?

A. No, I don't think it does. It is not funded.

Q. It serves some of the purposes of working capital?

A. I don't know that it does.

Q. I would like to have you explain. I would like to know what you are doing with $135,000 that the people pay into your treasury and you put in the bank, and under your theory you are doing it every year. If you invest it and get a revenue from it, all right. But I would like to know if you are using it for betterment, renewals, replacements, and to what extent.

A. I have stated that we are so using it. We have used it for all purposes that money is required in the operation of the street railway. In other words we do not keep it separate and distinct, and we have no fund representing that depreciation.

[fol. 789] Q. And that has been the practice from the reorganization in 1900?

A. Ever since we have set up depreciation in 1905.

Q. Isn't it fair to say that that has been always, since the time you began to set up depreciation reserve, the actual practice of the company, that it has operated practically for the purpose of a working capital?

A. No I cannot say that it has operated as a working capital at all.

Q. Then you have used it as a fund from which to make reconstruction?

A. We have not used it as a fund out of which to make reconstruction.

Q. You used the money to make the reconstructions and betterment?

A. We have had that as a liability and we have had against that certain assets. Part of these assets have been reconstruction and added property, but we have not put that money separately and distinct. We have not marked the dollars and kept it apart or put it into a fund, or done anything else with it except as a liability.

Q. You have not had to borrow any money, to incur any interest charge, because you have the money collected from the people each year, this money, annually, and so there has been practically no interest during construction, during any of this period since you began to put up a depreciation reserve?

A. I don't think it would have anything to do with interest during construction.

Q. What is the fact, has the company paid out a dollar directly comparable to construction from the time it began to set aside depreciation, annual accrual——

A. I think it has.

Q. Why should it when you have so much money, why borrow for that fund?

A. It has not always had the fund. It did not always have the fund. There have been times when we have had [fol. 790] to borrow the money when we had considerable liability.

Q. If it took the money out of the earnings each year, you certainly had the funds each year?

A. Well the money was taken out of the earnings in the sense that the expense was made to show the amount of depreciation, but there might have been demands and needs for the money in excess of the amount.

Q. That is what I am driving at, where did it go to?

A. I told you it went into construction, additional property, and all the uses for which money is required.

Q. Is it the practice to take money out of the funds of the people, and pay it into operating expense and put it into betterments and renewals and have it charged to the people as a part of the base?

A. I believe it is entirely proper and desirable.

Mr. Richards: We say to the Master that we deny their right under the proposition—that they have no right to take out an accumulated depreciation reserve for operating expenses and then take it out of the treasury and put it into betterments, and make the people pay all through the year. That is an injustice, we claim.

The Witness: I think you will find it has been generally approved as proper to do.

Mr. Richards:

Q. Your report here shows that in a recent period, I think you call it the year 1922, you have charged up for new capital investment the sum of $153,000 approximately. Is that true?

A. That is true.

Q. Where did you get the money to pay that?

A. It came from the past earnings of the company.

Q. Didn't you get it out of the money that you received this past year from the people and since the Brooks-Cole-
[fol. 791] man law went into effect?

A. No, I can't say that we did.

Q. Well you paid it. There is no outstanding debt about it, is there, it was paid off—all the betterments are paid for aren't they?

A. Yes I think they are, for 1922, they are all paid for.

Q. And you didn't borrow any money to pay them?

A. No.

Q. Therefore it came out of the Company's funds?

A. It came out of the Company's funds.

Mr. Mitchell: That is shown on Exhibit 23 as $153,435.38.

Q. Now Mr. Warren, isn't it a fact that your securities you have on hand will equal in amount what it was prior to the beginning of 1922?

A. I don't know, Mr. Richards, without referring to our balance sheet.

Q. Well I would like to know, I would like to have you answer that question if you don't know.

A. I will look it up and let you know.

Q. Do that. Strike a balance between the amount of securities on hand on the first of January 1922 and the first

of January 1923. Now I will assume if the securities in the Company's possession in 1923 were equal in amount to the securities on hand on January 1, 1922. On that assumption I will ask you what moneys were paid for these betterments that you call capital investments for 1922?

A. As I have said I cannot segregate one piece of money from another piece. Our balance sheet shows our liabilities and assets from time to time,—undoubtedly that did come largely from depreciation fund. That is, the liabilities. The depreciation has increased perhaps materially and the assets, new property, increased also; one has offset the other; but that is the only way.

Q. You borrowed no money?

A. No.

Q. And you have paid for those betterments and you say [fol. 792] now that you largely took it from the depreciation fund. Are you now claiming—I ask the counsel on the other side to state whether they are claiming that they have a right to add to their capital fund and make any reduction for proper rate of return upon such a duplication?

Mr. Carmichael: We will argue this at the proper time, Mr. Richards.

Mr. Mitchell: Well I think we can answer that question right now. Under the finding of the Commission the stockholders of this company were entitled to $345,000 as a fair return for 1922. They actually got $86,000. Now then, any difference in there was the stockholders' money. On the determination of the Commission we certainly, in that state of facts, are entitled to have added to the rate base any part of the money which, under the ruling of the Commission, belonged to the stockholders, and should have had it. We are entitled to have any part of it which was used in connection with the property added to the rate base.

Mr. Richards: Mr. Mitchell, didn't you get $244,000 instead of $86,000 according to your exhibits 37 and 38?

Mr. Mitchell: I am saying that the Commission said we are entitled to $345,000 net operating income, and entitled to pay all of it at par on dividends. We actually paid out in 1922 $86,000.

Mr. Richards (to the witness): Does it occur to you, Mr. Warren, that these moneys, taken from the people and set

aside each year for depreciation reserve, might just as well be used to serve the purposes of a working capital?

A. There in no reason it should not be used in part if there are no more urgent needs.

[fol. 793] Mr. Richards: That is all.

Examined by Mr. Carman:

Q. Mr. Warren will you refer to plaintiff's exhibit 25 in which you have set up an estimate of capital requirements for the last half of the year 1923, amounting to $68,784.41. Now isn't it a fact that so far as fixing the rate base is concerned it does not make the slightest difference what your capital requirements are for the last half of 1923?

A. I don't know as I have said that it did make and difference in fixing a rate base.

Q. Do you claim that you should have a rate of return that would yield you, under the Commission's order, $345,000 per year and also yield in addition to that amount and the amount specified in the Commission's order for all other purposes, this sum of $68,784.41 for capital requirements?

A. The rate of return should be sufficient to enable the company to secure new money.

The Master: Well, Mr. Carman, I don't think I should take much time on that, because it is evident that it would not be entitled to that, because you cannot be entitled to a return on new capital.

Mr. Carman:

Q. Is this anticipated $68,784.41 for capital requirements to be expended from your depreciation reserve?

A. From that or from the return. If the owners fail to secure sufficient in the return, there is no source unless the company can sell new securities or unless it takes the return it is entitled to or takes it from the depreciation reserve.

Q. That will be getting it from an outside source—the sale of the securities.

[fol. 794] A. What was the question?

Q. That would be getting it from an outside source, taking it from the sale of the securities?

A. Yes, getting it from the sale of the securities would be new capital.

Q. Do you think that it is fair for the company to have an allowance for depreciation reserve in order to keep the property of the company up to an adequate state of efficiency and then use a part of the depreciation reserve as a new capital investment on which a new rate of return should be computed?

A. I think it is entirely fair. I think it is necessary.

Q. And you have had that idea in mind all through these exhibits that you have made up here?

A. Yes.

Mr. Carman: That is all.

Examined by the Master:

Q. Mr. Warren, were these tables prepared on the theory that depreciation reserve should go any further than replacement of property actually used in the service?

A. Oh no, no they were not. The only purpose of preparing tables showing capital requirement was to show the need of the company for capital. The capital has not been sufficient for a good many years under the conditions that have existed.

Q. I understand you to say, considering capital requirements and that sort of thing,—that under this theory, unless a rate was established on a compensatory basis, you could not sell your bonds for new capital?

A. That is true.

Q. And you do not claim that any of these bonds for capital requirements should be added to operating expense?

A. No.

Q. The depreciation you set up is what rate?

A. It amounts to a rate of about 2.9 on the Commission's value.

[fol. 795] Q. And the Commission allowed a rate of 2½?

A. I believe so.

Q. Would the rate of depreciation set up by you include any more than a reasonable and proper maintenance of the property and of the replacement of the property exhausted and used up in the service?

A. Nothing whatever.

Examined by Mr. Carman:

Q. Mr. Warren, you have stated in previous testimony, that the Company set up and claimed as proper a depreciation reserve of approximately three per cent?

A. Something less than three per cent.

Q. And that it has been so doing regularly since it started to set up a depreciation reserve?

A. It has been setting up depreciation at the same rate and under the same plan since about 1914.

Q. And can you give us, offhand, any idea of how much of that 3% has been actually expensed into replacement and renewals, and other expenses from depreciation reserve?

A. Our depreciation account will show that exactly. I haven't it in mind. I can give you the amount that has been expended.

Q. But can you say the actual amount that has been expended?

A. Yes.

Q. If you will, please.

Mr. Carmichael: I think that is already in the record of Mr. McWethy's testimony. Mr. McWethy testified to that ten days ago.

Mr. Carman: Well it may be hard to find it.

The Witness: I am sure it is in Mr. McWethy's analysis.

Mr. McWethy: Yes, on page 9A of my report Exhibit BB.

Q. Mr. Warren, referring to the Commission's Exhibit BB, table No. 2 on page 9A, which sets up the amounts for the depreciation reserve account and the balances, and so [fol. 796] forth, do you believe that table to be correct?

A. I believe it to be substantially correct.

Q. On the preceding page 9, the statement is made to the effect that from 1909 to 1916 there was 1.41% of the full value needed for depreciation; from 1917 to 1920, .312% and that the average for the whole period was 1.05% actually expended for replacement of depreciated property.

Q. Do you believe that to be substantially correct?

A. I would not question but that these figures show the amount of money actually expended in renewals, but that

would have no relation whatever to the depreciation that existed and was continually going on.

Q. Now what I am trying to get at is this: do you contend that the unused balance of that sum set aside for depreciation reserve is the property of the stockholders or owners of the street railway company which they may use as they see fit, either for the purpose of renewals and replacements or for any other purpose, in or outside of the company, that they may see fit to use it for?

A. I would not claim that it could be used as the owners saw fit—not in any way that the owners saw fit—I do claim that it is perfectly proper to use it for additions to property or for any proper purpose in the operation or additions to the street railway plan.

Q. You do claim that it was proper to use it as new capital expenditure?

A. I do.

Q. And to capitalize that and to use that in the capital expenditure for a rate base for fixing an adequate return?

A. Yes.

The Master: Let us assume that the amount of depreciation as charged (under any percentage) is $100,000. You use $50,000 of that for the ordinary upkeep and maintenance of the property. In the meantime, however, machinery of one kind and another is depreciated to the extent of $50,000 more. Do you claim that the $50,000 left after maintenance can be added to capital and still be original investment as to that machinery so depreciated, be kept as capital also?

[fol. 797]

A. I think—by maintenance you refer to renewals other than maintenance—I believe the amount left in the depreciation fund after making the renewals, is entirely proper to be added—to be used for the purpose of additions and betterments—additions to property.

The Master: But don't you get a duplication there?

A. No. The owner is entitled, it seems to me, to have his investment kept intact.

The Master: Yes he is entitled to have his investment kept intact, but has he the right to have both his investment and the amount collected by him to replace that investment?

A. I don't think that would be a duplication. I don't look at it that way.

The Master: I understood that that was the exact thing that you disallowed a moment ago, when you said you did not think you had any right to apply the balance left from the depreciation outside of maintenance to capital?

A. I didn't say that.

The Master: I understood you so.

Q. I said that I did not believe the stockholders had a right to use it for anything they saw fit outside of the business. I think they do have a right to use it in the business.

Mr. Carman: It comes down to this then, that his conten- [fol. 798] tion is made that any part of the depreciation reserve which the company does not use in actual renewals and replacements may be taken by the stockholders and reinvested as new capital in the company and that reinvestment of that amount as new capital may be added to the rate base upon which to compute the return for future years.

Mr. Carmichael: I think we will agree with that, if it is in lieu of dividends or a reasonable return to stockholders.

Mr. Carman: Well, suppose, Mr. Warren, that in the year 1923 you had, in addition to your depreciation reserve, taxes and other charges and operating expense—you had $345,000 net return, and that is in addition to $134,000 depreciation reserve. Do we understand that if the company wishes to take $100,000 of that depreciation reserve money and reinvest it in new property, extensions or additions, that $100,000 shall be added to the rate base on which to compute a net return for the years succeeding 1924

A. I believe it is proper. The stockholders would not get rid of their liability for accrued depreciation. That would have to be made up sometime.

Mr. Richards: Considering the investment in the property, according to basis No. 4, and in view of the past history of the company, am I correct in the assumption that moneys accumulated in the depreciation reserve have been to a large extent expended in the property which is shown up in the books and leads to that investment basis No. 4?

The Witness: You are correct in assuming that what ever deficiency there may be in the funding of the depreciatiion reserve may be located there or anywhere else. It may be allocated there or anywhere else. It may be in addition

[fol. 799] to property. It is liability on one side of the ledger and an asset on the other.

Mr. Richards: If, as a matter of fact, that is a duplication of capital, by taking the moneys, derived from the public in annual operating expense, and intended to secure replacements and renewal, if it is not so used, but is expended in new construction, and if that is not allowable as a proper base on which rates are to be fixed, wouldn't it follow as a matter of fact that the capital shown in the book values on the investment basis No. 4 would be in excess of the proper amount so to be shown?

A. I do not understand that it woud be a duplication.

The Master: I suppose your theory is that there is an actual depreciation in the property to the amount as charged where the charge is fairly based, and if you take that amount and put it into new extensions, there is no duplication because your other property, the old property has actually depreciated and lost value to that extent.

The Witness: Exactly. And if you will take out of the depreciation account the money that should be there, it would be exactly equivalent to borrowing it from the bank or from any other source. You would owe it to the fund and you naturally will have to pay it back.

The Master: Now if you maintain your original rate base, or original valuation at the amount paid, and then have the amount invested in the depreciation fund in the new property, you would have a duplication, would you not? Suppose you start out with a rate base today of a million dollars and set aside a depreciation of $30,000, and next year you expend that $30,000 on extensions or new [fol. 800] equipment, and if you maintain your original rate base of a million, with that $30,000 for new equipment, there would be a duplication would there not?

The Witness: Yes, in that case you would owe your depreciation fund nothing. You would have expended all you set up.

The Master: In that case, don't you think the amount charged to depreciation and invested in new property should be deducted from the original rate base?

A. If you handled it in that way there would never then be any theoretically accrued depreciation.

The Master: Can you show how that could be done?

A. No I don't think it could be done.

The Master: Do you agree to this with reference to the additions, for the rate base since the Commission's order, or are you questioning the use of depreciation reserve prior to the Commission's order?

Mr. Richards: Well we are not so much interested in that, except it occurred to me on the face of it there had been a previous duplication which has increased the capital and that therefore the base actually used ought to be considered as too high. The point originally started with in cross-examining Mr. Warren was that with the money on hand it solved the question of working capital.

Mr. Carman: My point was directed to the question of a proper rate base since the Commission fixed it upon the theory that at that time the property was in 83 plus per cent condition, and the point I was attempting to bring out was that, to use any of the depreciation reserve after that time as a new capital investment, and add that to the rate base, without correspondingly reducing the per cent condition of the property, is not proper.

[fol. 801] Mr. Richards: And another point: you will remember in cross-examining Mr. McWethy as to the adjustment made of the normal operating expenses of 1922 and 1923, Mr. McWethy included a matter of the additional betterments, and capital charges presented by the Company for this last year amounting to $153,000 in his hypothetical base, on which to figure an income and the net operating expenses. We have demonstrated from this discussion here, and I have it in mind that that is an improper basis of figuring. They have no right to make any such duplication of capital. We will have to readjust our figures which will show an increased return under Mr. McWethy's theory, and over that which he stated, because he is allowing 7½% upon $153,000 more capital than they have any right to include, although all the time, if your Honor please, I have objected, as your Honor will remember, to having the matter tried on any other basis than as of July 13, 1922, and to which no new capital should be included.

The Master: On December 31, 1921.

Mr. Richards: The Commission's order, yes.

The Master: That is true, the defendants have all objected to any additions to capital since December 31, 1921,

upon the theory that this case must be determined by the facts as they existed before the Commission's order. The plaintiff, on the other hand, has insisted on the right to add to that value, the proper capital expenditures since that day, and I stated when the matter came up that I would make findings on both those facts. A finding here as to the value on December 31, 1921, and what additions were made since that time, are all matters which would be before the Court to determine, to determine whether those addi- [fol. 802] tions may be taken into consideration. As I remember the language of the decisions, the value should be fixed at the time of the inquiry, and it is for you gentlemen to consider whether that time is at the time before the Commission or at this time, but we can make the findings of fact so that the question can be raised. As I understand this discussion it is a question of the depreciation being properly used for additions to capital, confined to such use since December 31, 1921, and the Master will not be asked to make any findings as to any such inclusion prior to December 31, 1921, is that correct?

Mr. Carmichael: That is my thought.

The Master: Do you agree with that, Mr. Richards?

Mr. Richards: Well I was just thinking about that.

The Master: I am trying to get this matter so we can possibly understand each other.

Mr. Richards: I will join in the statement Mr. Carman made.

Mr. Carman: I would like to add at this point that since it now appears that the capital expenditures made subsequent to December 31, 1921 have been made from depreciation reserve, that they may properly be added to the rate base at this time.

Mr. Mitchell: We, of course, do not concede that there is any testimony to that effect.

Mr. Richards: Calling the attention of the witness to the maintenance of Ways and Structures in exhibit 37, I ask you whether the money there stated was actually expended.

The Witness: Those amounts as they appear in Exhibit 37, being $6,399.77, for equalization of Way and Structures, [fol. 803] and $1,341.58 for equalization of equipment, were not amounts expended, on the other hand they were amounts representing deferred maintenance. At that time

the amount had not been expended. You will notice on subsequent statements those figures—those figures appear in red.

Mr. Richards: Do they appear then on those statements covering the twelve months ending July 31, 1923?

A. I say they appear as having been over expenses. There was more expended than shown to the extent of $2,142.10 in account 28, and $1,270.40 in account 44.

Mr. Carmichael: Those figures show on Complainant's Exhibit 38, Mr. Warren?

A. Yes.

The Master: I have been furnished with a copy of the order of the Interstate Commerce Commission, a uniform system of accounts for electric railways, the issue of 1914. If it is not an exhibit I suppose I am at liberty to use that?

Mr. Richards: Certainly, with our consent.

The Master: These items you have been speaking about, 28 and 44, I understand are included in the formal report that was made and I would like to know whether the form required by the Railroad Commission includes those same items?

Mr. Carman: It does.

The Witness: I understand it does.

Mr. Richards: The Commission, if your Honor please, made an order requiring the Street Railway Company to make its report according to the classification of accounts established by the interstate Commerce Commission in the year 1914.

The Master: And those items must have been in the form of the report and required for some purpose.

[fol. 804] Mr. Richards: We are relying upon this proposition laid down as I understand it by the Supreme Court of the United States, saying that to determine the proper normal expense, deferred maintenance should not be considered. If that is not the law then there is nothing to our point. If it is the law this item should come out.

Paper marked City's Exhibit R.

Mr. Richards:

Q. I show you the City's Exhibit R and ask you what that is, Mr. Warren?

A. It is a statement of the number of passengers per half trip carried in each section of the city of Duluth by quarters beginning with July 1921 and ending with July 1923.

Q. Is that a true statement of the actual facts shown by your records?

A. It is a true statement shown by the record of passengers carried. However, Mr. Richards, it shows the total passengers and not revenue passengers. It shows the averages for five representative days in each of the months named.

Q. Is it a complete statement covering all lines?

A. It is complete as far as it purports to be.

Q. Is it a fair statement in your judgment for comparison?

A. It is a true statement, and I assume that a true statement is a fair statement always.

Q. You have here on the first line "West end of Third Street" a star, and there is no other star on this exhibit, and I think your statement was, last Saturday, that there has been, with the exception of a slight change on Park Point an owl car which in total did not affect more than 10,000 car miles,—but there had been no change in fare of the city of Duluth on any of the lines except on West [fol. 805] Third Street. Is that a correct statement as you intended to put it?

A. I do not think it is a correct statement of what I stated. I stated, with the exceptions of the two changes ordered by the City Council there had been no change made in the service schedules, the base schedules, but that at all times were in the habit of running a number of extra cars (they were not treated as schedule cars), that changed from time to time as the traffic necessitated, and that there had been some changes in those cars. I did not so state at the time, but I recall now that there have been quite material changes, I don't know which way, whether an increase or a decrease, on account of shifting in the hours of the Steel Plant employes. I stated that the only changes of any extent that would affect the mileage, or the only change, was the addition of some extra service in the slack hours, the non-rush hours, on the West Third Street lines.

Q. What do you mean by the West Third Street line?

A. I said the West Third Street lines—I mean the lines that run on West Third Street.

Q. From what point to what points?

A. I had in mind and was thinking of them as running from the center of the city, but as a matter of fact those lines are double end lines, and through lines, and they also serve the eastern portion of the city. But in speaking of them at that time I had in mind the proportion of the road that runs from the center of the city west, from Third street to New Duluth, Morgan Park and Fifty-seventh Avenue West.

Q. What do you mean in that statement by center of the City?

A. I consider the center Third Avenue East to Eighth Avenue West for the purpose of this record of passengers carried.

Q. And in this calculation referred to in City's Exhibit R, what now do you say is the territorial limits of the West [fol. 806] end of Third Street as here stated?

A. From Eighth Avenue West to Fortieth Avenue West, of the West Third street lines.

Q. Now I understand you, in this exhibit, you say you made an addition of 62 trips daily beginning December 21, 1922. I understood you that there had been no change in the schedule in that territory from Eighth Avenue West to the westerly limit that you speak of during the year 1921.

A. I do not recall that I made any statement in regard to that in 1921.

Q. Was there any?

A. There may have been.

Q. Who fixed that schedule?

A. To what schedule do you refer?

Q. The schedule for 1921, the schedule of service?

A. The schedule of service was fixed by the City Council as the service schedules that were in effect as of October 11, 1920 or 1921, I am not clear.

Mr. Carmichael: 1920, but the resolution was not passed until long after that.

A. August 1, 1921, I think.

Q. I think you are correct, August 1, 1921. It is admitted in the record that by resolution of the Council as of date August 1, 1921, the operating schedule of the street railway that had continued in force from sometime in October

1920—up to that time, was the standard of service fixed and required by the Council.

Mr. Carmichael: Well I will check up on that date, I have the resolution in the office. There was a resolution in between where you did order a very substantial increase.

Mr. Richards: If you don't want to make that admission.

Mr. Carmichael: I will admit the date of the resolution [fol. 807] subject to checking it up at the noon hour.

Mr. Richards: All right. You understood, I assume, Mr. Warren, that you were to continue after that resolution of the Council the same standard and schedule of service that you were then operating under?

A. Yes.

Q. And that you did follow that resolution during the year 1921?

A. We have made no changes in the schedule since that date except those two that were ordered by the Council. We have changed the extra service.

Mr. Richards: Well you have answered the question. Did you make any change in the schedule during 1922 up to November 21, 1922 over the schedule that was in force and operation during 1921.

A. During the year 1922 we made some temporary changes on account of tearing up of Superior Street, they were not permanent, or not material.

Q. And whatever you did there was done under permission of the Council?

A. With the understanding of the Council, anyway.

Q. Did you ever bring, in an official way, any written communication to the City of Duluth—to the City Commissioners of the City of Duluth, of your intention of making a change in the West Lake Street line, from Eighth Avenue West to the western end of the city?

A. I did not.

Q. It now appears in evidence that you made that change, as you say, after consultation with your Counsel, which amounts to an increase of approximately three hundred thousand car miles for the first seven months of 1923. Is that a fact?

A. I would not say it amounted that it amounted to that [fol. 808] change in car miles. We did make such a change as I referred to in the extra car service.

Q. I am referring specifically to City's exhibit Q now in evidence, isn't that the fact—deducting the 10,000 car miles that you speak of in regard to the owl car and the Park point, that would leave an excess of over 300,000 car miles additional to the former schedule, would it not, for those seven months?

A. I have not as yet attempted to check up to see how that increase shown by this Exhibit Q was due to the added service on the West Third Street line.

Q. It shows on its face, doesn't it?

A. I would say that would account for the greater part of it. There were constant adjustments in the extra service.

Q. As a matter of fact that increased the operating expense of the company, approximately 17.2% over what it was prior to that time——

A. No, no.

Q. That is not correct?

A. No.

Q. If not, why not?

A. Why does it not increase the operating expense 17%?

Q. Yes.

A. It does not. I don't know what you refer to, by 17%. I know there was no increase in operating expense of 17%.

Q. The increase of car miles made an increase in the cost for power?

A. Yes.

Q. The cost for labor?

A. Yes.

Q. The cost for maintenance?

A. Somewhat.

Q. Repairs and so forth?

A. Yes.

Q. Men in the car shop and otherwise. Any other items [fol. 809] besides power, labor, maintenance, repairs?

A. The service that was put on the Third Street line was not an increase such as is usually made at the peak or rush hours. That kind of increased service does increase expense very greatly, the kind where the increase is made in the rush hours. In the case of the West Third Street service the only change consisted in keeping out in service on the line about five cars that had *been* previously been pulled

out in the morning for a trip or two and put them on again at noon for a trip or two and in the evening again for a trip or two. Instead of pulling those cars out and in constantly, we left them out and we saved the mileage pulling them in and save the hauling of the cars into the car house and out and we reduced the wages per hour from about $1.38 per car crew to .92¢ by reason of that fact, that is, instead of paying the men for pulling-out time, or tripper time at considerably more than actual time, to compensate them for going and coming to their work, pulling the cars out on the line and back again, we paid them for the continuous time they were in operation on the line, just for the time they put in. And there was not as much increased expense by reason of that as if it had been increased during the rush hours. In fact I am very sure that in increasing the West Third Street, the additional extra service, the added passengers——

Q. I am not asking you about that. You have stated your views on that subject. I am asking you about operating expenses.

Mr. Carmichael: He is telling you that.

Mr. Richards: I see he is. There are 62 trips, you say five cars.

[fol. 810] A. About five cars.

Q. Were they used equally?

A. The five cars used equally?

Q. Yes.

A. I would say about equally.

Q. With five cars that would mean an average of about——

A. Twelve trips to a car.

Q. Your records show when these trips were made?

A. Yes sir.

Q. Will you please give us a schedule of this in the afternoon, the actual schedule of these actual cars running at that time?

A. If I can do that this afternoon I will try.

Mr. Richards: I would like to have you, Mr. Warren, to save time, if you please, bring in a statement of the added cost of power by virtue of these 62 trips, and the added cost of trainmen's wages, the added cost to account No. 30 and No. 70 and any other accounts that to your knowledge

have a legitimate bearing on the question of added costs, through that addition to the service.

Mr. Richards: I offer in evidence Exhibit R.

The Master: Car miles refer to car miles made by the cars?

A. Yes.

The Master: It has no reference to passenger miles?

A. No, none whatever.

The Master:

Q. You mean the number of miles the cars actually hauled?

A. Yes.

Mr. Richards: I think you testified last Saturday that you were of the opinion that these 62 extra trips paid for themselves, and I think you were asked to produce your records to prove that statement, have you those records?

[fol. 811] A. I have not the records that would demonstrate that the trips paid for themselves. I don't think it would be possible to demonstrate that mathematically.

Mr. Mitchell: Do you have any question in your own mind that those trips did pay for themselves?

The Witness: I have very little question but what those trips fully paid for themselves. I made some investigation to ascertain that and every indication is that they did fully pay for themselves. I may have some data on that later.

Mr Richards: But I understand you to say you have no records, of course I was asking for details.

A. It is not possible for us to show how many passengers would have ridden under certain conditions, to figure that out mathematically.

Mr. Mitchell: But in your judgment, failure to run those cars would have cost you more in loss of wasted revenue than in this way?

A. The increase in passengers carried in that section immediately after putting those cars on, and the record of the passengers carried in jitneys and everything, goes to indicate that those trips fully paid for themselves.

At this point a recess was taken until 2 P. M.

[fol. 812] Afternoon Session

(The examination of Mr. Warren was continued as follows:)

By Mr. Richards:

Q. Are you now able to state, Mr. Warren, from your records, what the actual schedule of operation of these 62 extra trips was from November 27, 1922, on?

A. I can say no more, or not a great deal more than I could before the noon recess which was that upon November 27, these cars, these five minute cars which had been running morning noon and evening were continued through the slack hours. We did not have that on any printed schedule, it is not a part of the schedule. It is what we call extra service and I was unable to find any printed schedule showing those trips.

—. Then if you didn't have any printed schedule or any other definite schedule, how can you state just what hours they did run?

A. In the first place I have a very clear recollection of what was put on at that time, and we have scattered memoranda and data that would show about how those cars run, but nothing that is exact. I presume the time has been somewhat changed since then, perhaps several times.

Q. Since that time?

A. Yes.

Q. Are they running on a definite schedule now?

A. They always have had a definite time to run, the same as any extra cars, but that might have been changed. I don't think it has been materially changed, I think they are still running as they did at the beginning.

Q. Can you give us what the actual schedule now is?

A. Well, as I stated it is—the extra service consists of these extra cars which run from Third Avenue East and Superior Street Fifty-Seventh Street, between the regular [fol. 813] cars, that run to Fifty-seventh Avenue West and to New Duluth and which make a ten-minute service as far as Fifty-seventh Avenue West, where they branch off. These cars run half way between those cars and they have so run since November 27th.

Q. It makes this a five-minute schedule?

A. It makes it a five minute schedule where there had been a ten-minute schedule during the morning and noon—I am not sure about the noon, but during the morning and the evening, at least during the rush hours. They run just the same as they did before, except for pulling off for an hour or two and then going out again, they remain out.

Q. What was the schedule between those points before you put the extra cars on?

A. It was about ten-minute service as far as Fifty-seventh Avenue West and then branched off in two lines, which gave the ten-minute service.

Q. Then you gave five-minute service?

A. As far as Fifty-Seventh Avenue West.

Mr. Carmichael: That is, they had ten minutes between—until twelve at noon, and from eight in the evening until midnight the change was giving five-minute service from twelve to four and from eight P. M. to midnight?

A. Yes, continuing the five-minute service.

Mr. Carmichael: And before twelve noon and from four until eight in the afternoon, it was five-minute service and has always remained as such?

A. Yes, there hasn't been any change.

Q. Hasn't it been your custom to consider from eight in the evening along towards midnight as the peak of service in a degree?

A. We never have considered the period from eight in the evening until midnight as a peak period.

[fol. 814] Q. It is a period which takes account of the travel of the public to all the entertainments, does it not?

A. Yes.

Q. Pro and con?

A. Yes, but that has never been what we call the peak service.

Q. It doesn't make it any different whether you call it peak or not peak as far as it concerns the service?

A. It never has been peak in fact.

Q. It makes no difference in this case whether it is called peak or non-peak, as long as you increased the service from ten to five?

A. It makes all the difference in the world in cost whether it is peak or non-peak, it does not make any difference what

you call it, but it would make all the difference in the world whether the increased service were peak or not.

Q. You say this additional service was put on not to offset the jitney competition?

A. That was one consideration and also because that section had had less service in proportion to its traffic than any other section in the city, and we felt it was entitled to a good deal better service than it had.

Q. And did you put this extra service on in the afternoon from twelve to four to offset jitney competition during that time?

A. Yes, partly.

Q. Did these hours take in any part of what you ordinarily call peak service?

A. No, the peak is around seven and eight in the morning and again around four thirty to six thirty in the evening.

Q. But you well understood that by increasing this service during those hours, from ten minutes to five minutes service, you were greatly increasing the operating expenses per annum?

A. I did not. It did not greatly increase the operating cost as I have said before. It brought more revenue than added cost.

Q. As a matter of fact it did increase the operating cost seventeen per cent, didn't it?

A. No.

[fol. 815] Q. Well, if the net increase is over three hundred thousand car miles on the basis of the legitimate and prior schedule of 1,843,545, doesn't that amount to 17.2%?

A. I presume you are speaking of the increase in car miles?

Q. Yes.

A. Yes, but that increase in car miles was not by any means all due to the extra service on Third Street. In fact a very material part of it was not due to any increase at all in 1923, but rather to the decrease by reason of the Superior Street paving conditions in 1922, there was an abnormally low mileage in the summer of 1922 owing to the condition of Superior Street. We were unable to run cars on their usual routes and that materially cut down the mileage and the increase as between 1922 and 1923 is largely accounted for by that.

Q. Were not the car miles in 1922 practically the same for the same months the first seven months of 1922 as they were for the first seven months of 1921?

A. No, no.

Q. If not, why not, and how much?

A. I think I can tell you. It was less than one-half of the year 1921.

Q. I don't think you have stated yet the exact number of car miles for the first seven months of 1921?

A. In June, 1923 there was a decrease of 9% in car miles, 25,000 car miles less than in 1921.

Q. Between the first seven months of 1921, if you please, by months?

A. January 275,496, February 251,255, March 278,343, April, 270,460, May 279,924, June, 275,774, July 285,676.

Mr. Richards: Now you speak of the time that Superior Street was torn up, that occupied what distinct period?

A. May, June and July of 1922.

Q. Will you please indicate if you can rightly by figures, just how much the car miles fell off in the three months of 1922 owing to the interruption of the street car service [fol. 816] on Superior Street, below the figures reached in 1921, for those three months?

A. I can give you the amount the car mileage fell off, but I cannot give you the amount it fell off due to that cause.

Q. Well just let me have that then.

A. It fell off 2,960 miles in May, 25,265 in June and 154,012 in July.

Q. A total of how many?

A. 43,997, if I add correctly.

Q. Well that is no answer to the increase here in the first seven months of 1923 of over three hundred thousand, Mr. Warren is it?

Q. Well it is good as far as it goes.

—. To what extent then did the increased car miles for 1923 in your judgment, in actual percentage increase the operating expenses over the normal for 1921? Take that as a basis.

A. I am not sure that I have your question correctly.

Q. Put it in another form then. Deduct from the 300,000 extra car miles in the first seven months of 1923, we allow

shortage of a difference between those car miles in May, June and July, 1922 from those of the similar three months in 1921 which you put at 43,997,—that would leave the difference in how much as a direct comparison with the same three months—the seven months of 1921?

Mr. Carmichael: Objected to as not a fair comparison.

The Master: Of course Mr. Richards has the right to get his question if he wants to get the figures, and if they are misleading you may correct him.

A. You say there was an increase of 300,000?

Q. I will withdraw that question temporarily. Please state the total of the car miles operated the first seven [fol. 817] months in 1921?

A. 1,916,928.

Q. Then take this 1921 as a normal year and did you not operate car miles in 1923 for the first seven months, corresponding months to the extent of 239,000 more car miles than in the same month in 1921?

A. An increase in the first seven months of 1923 over the same months in 1921,—I would make the increase 238,824.

Q. Well, take that 238,824; that is 12½% of the increase above that of the first seven months of 1921. If you call that normal that would be an abnormal increase of 12½% of the operating cost or at least in excess of the car miles, we will put it that way.

A. I don't get that at all.

Q. Well that is the assumption that 238,824 is 12½% of the total that you gave of car miles for the first seven months of 1921.

A. 12½% of 1,916,928?

Q. Yes.

A. Well it would be approximately.

Q. Now then in that normal schedule, if that schedule had been kept as fixed by law as in 1921 and not changed by you in 1923 without legal authority, is it a fair assumption that you would, in your annual operating expenses, have been operating at so much less percentage of the operating cost per year?

A. If we had considered that the Council's resolution required us to maintain exactly the same service, extra service and schedule service, and we had attempted to do that,

we would not have had any income at all, I think, we would never have met the requirements of the changes almost daily, requiring changes in the time of the extra cars. We always considered that as a changeable part of the service. We have to take off cars and put them on, there are all kinds of changes. Changes on Superior Street, tearing that up, and numerous things occurring that require frequent [fol. 818] changes in the extra cars, which does not change the schedule at all.

Q. This was not a frequent change, this was a regular change, running four hours in the evening in each day and four hours in the morning.

A. This was a regular change.

Q. This was a regular five minute service?

A. Yes.

Q. On a schedule that you have no authority to change. You have never applied to the City Council for any such permission and it increased the operating expenses of the company?

Mr. Mitchell: That is not admitted.

Q. Well we will show that. I would like to ask you your opinion, as manager of this company, who has the making of the schedule which shall determine the price which the people have to pay for the service that they get, is it the company or is it the City Council of Duluth, or is it the Brooks-Coleman law?

A. We have considered that the City Council have the making of the schedule and we have observed the City Council's schedule except as to extra cars.

Mr. Carmichael: You have always observed the City Council's schedule as a minimum amount of service, have you?

A. Yes.

Mr. Carmichael: And have always adhered to it regularly?

A. Yes.

Q. Do you know Mr. Warren, as a matter of fact, that growing out of the hearing before the Railroad Commission, that the matter of establishing a standard of service that the people of Duluth wanted, and which fixed the price which they were to pay and determine the rate of fare that they would pay, was in the hands of the City Council for its conclusion and that the Railroad and Warehouse Com-

[fol. 819] mission had no jurisdiction in the matter, nor the Street Railway Company. In other words that the City Council would determine the price that they were to pay for what they were getting and fix the standard of service that they wanted.

A. I knew that the City Council had fixed, or attempted to fix a standard of service. I did not at any time consider that that absolutely fixed all the extra cars that we should run to the theaters in case of a special crowd and to the Armory in case of an entertainment, and when it came to this Third Street matter we gave it a great deal of consideration and I consulted Mr. Mitchell about it and was very careful to do what seemed to be the right thing.

Q. Why was this matter not brought to the attention of the City Council?

Mr. Carmichael: Because the City Council had ordered you and some others to investigate the matter.

Q. Were you not informed in the argument before the Railroad Commission that the City Council had adopted this definite standard of service in order to lay down the yardstick rule by which *by which* there could be no material variation, which might have an effect upon the fare the city were paying, and intended to preserve, so far as possible, the five cent rate?

A. I don't know that I was informed in those words.

Q. Didn't you know that was a matter of contention between the Commission and the City——

A. And as far as that is concerned we have not deviated from that schedule in any way that would adversely affect the fare, quite the other way, I think.

Q. If the operating expenses were so increased as to [fol. 820] amount to about $36,000 a year, tell me if you think you had a right to do that without getting authority from the City Council?

A. In the first place they didn't amount to $36,000 a year.

Q. Assuming that it did.

A. Well that is a ridiculous assumption.

Q. Very well. How much extra cost of power did that mean, those 238,824 car miles?

A. I can only give you that approximately in cost per car mile. I can give them to you with a little reference to memoranda here as to how much it would amount to per

car mile. I can give you, if you want it, just as soon as I can ascertain what the increased cost on the service was, if that is what you want.

Q. I do not want it with your explanation, your theory of—with your theory that revenues cut it down to net, I want to know the actual increase of operating cost.

A. Well that is what I can give you, the actual increase operating cost.

Q. That is found in Plaintiff's Exhibits 37 and 38, is it; necessarily, does all this come under the head of conducting and transportation, Mr. Warren?

A. Not entirely. The answer to that question could not be found in Exhibits 37 and 38, Mr. Richards.

Q. Where would the essential elements to determine this matter of increased operating expense be found except under the head of conducting and transportation?

A. Outside of that there would be an increase in the cost of power and that is about all the increase in the service, power and in the cost of transportation.

Q. All right, you give us your estimate of the increased cost of power for the increased number of car miles.

[fol. 821] A. The power would cost at the same rate as the other service, a little less than 3 and one half cents per car mile.

Q. On 238,824 miles what does that amount to?

Mr. Carmichael: You mean that would be the added cost or the total cost?

A. That would be the cost for power for the added service.

The Master: As I understand, Mr. Warren is now giving you the increased cost, from this change of schedule, and the cost would be increased 3½¢ per mile.

A. But on the mileage, Mr. Richards, I don't know what that mileage means, I don't think that has any reference to this service, the mileage you are talking about.

Q. I am asking for a car mile, Mr. Warren. What it costs you to run the car a mile. How do you arrive at the matter of cost per car mile?

A. By dividing the cost of the power by the number of miles run.

Q. Is that how you arrive at this 3½¢?

A. That is the only way I know to get it.

Q. Wouldn't you multiply the 238,824 by 3½¢, I mean the number of extra car miles that you put into effect over the normal schedule fixed by the City Council in its resolution establishing the legal standard of service?

A. I don't think it means anything of that kind.

Q. All right, if not, why not?

A. I don't know why.

A. You are talking about the Third Street Service?

Q. Yes.

A. The car miles added in the service——

Q. I have eliminated anything anywhere else because you have said there was only 10,000 car miles used anywhere else. You have confined the use of this extra 62 trips per day to the West Third street line.

[fol. 822] Mr. Carmichael: Objected to as assumption. I don't think that Mr. Warren has testified that way as yet.

Mr. Richards: Most assuredly he has.

Mr. Carmichael: Then the record will show.

Q. If I am mistaken I am willing to have the witness correct it.

The Master: Mr. Warren has testified that the total car miles in the first seven months of 1923 was 239,224 more than in the first seven months of 1921. Now he has testified that the power cost of that car mileage is 3½¢ per mile. These are computations that any of us can make.

Mr. Carmichael: Mr. Warren's point is that the two hundred odd thousand miles is not all on Third Street.

The Master: Well it is for you to show, Mr. Carmichael, on cross-examination. Mr. Richards claims that it is.

The Witness: If you want the multiplication made on 238,824 by 3½¢ I will make that——

Mr. Richards: Do that.

The Witness: —whether it means anything or not.

Q. I am asking where it necessitates an increase over the authorized schedule.

A. It certainly increased on Park Point for one thing.

Q. All right. Eliminate that, strike off 10,000 from that total and recast the multiplication.

A. 8,008.84.

Q. Now go to the question of trainmen's wages and determine what that extra car mile—and now we will deal also

with the same figure 238,824, as before, after deducting 10,000 for the owl and the Park Point.

A. The cost of carmen's wages for the service was 9.58¢ per mile. That was based on the wages effective at the time the service was put on in November.

[fol. 823] Q. That is intended to apply to what?

A. That is the cost of wages on the West Third Street Service.

Q. Alone?

A. Yes.

Q. We are not talking about West Third Street, Mr. Warren. We are talking about the 238,824 extra car miles.

A. Of which the West Third Street is a part.

Q. Of which that is a part. And I asked you what this amount resulted in in extra wages?

A. Well I can only approximate that. It might be ten cents.

Q. All right, we will take that. That would be $22,882.40?

A. Yes.

Q. Now what other items are necessarily connected with that extra operation of cars?

A. I think that when you take the car wages and the power you have covered all of the expense, that is extra over straight service at least—I would not say that is true of the other increased services, but that Third Street service was rather unusual service.

Q. Isn't that element of depreciation, the wear and tear on the rolling stock, also wear and tear on the track?

A. I would say that wear and tear on the track was somewhere proportionate to the use made of the tracks, generally speaking, and of the cars, but I would not apply that to the West Third Street service, because there was a great saving there by saving the pulling of cars in and out again twice a day and saving of car house men, a great deal of work there. I think that would offset the added cost of the other estimates I would ordinarily include in the cost of extra service.

Q. This makes it necessary, I think, Mr. Warren, for you to distinguish where these extra car miles are put into effect.

[fol. 824] A. I could not do it now here, it would take some time, a day at least, or maybe two days to go over

the records and find out just where the increases have been made and where decreases have been made.

Q. Mr. Warren you have stated here that you put on 62 trips daily on the West Third Street line and you have not mentioned any other place where you put any on?

A. No.

Q. Now why not approximate the expense of the extra cars used and the service under that exhibit, City's Exhibit R?

A. Because I cannot do it. I do not know of any other place or any other time when we put out any considerable amount of extra service. We have taken off service and put on service here and there, but at no time on no line has it ever amounted to anything like as much as it did on the Third Street line.

Q. All right, then why not call it all on the Third Street line?

A. I don't think it was all on there.

Q. Well, practically all of it was, wasn't it?

A. Most of it, yes.

Q. If you can't distinguish where else it went why not let it go there and be done with it and deal with it on that basis? Will you give us the average mileage on each of these cars that made the 62 trips per trip?

A. I can give you the mileage made by the cars that were put on the Third Street line on November 27, 1922. That was 515½ miles per day.

Q. This would give, dividing the 62 trips into 515½ miles, according to your figures, 8.31 miles per trip?

A. Yes.

Q. How many days did you operate with these cars, do you know during the seven months of 1923?

A. There was some difference every day of the week. It might not be exactly the same on Saturdays and Sundays, but I imagine that the Saturdays and Sundays would [fol. 825] average up about with the week days. All these schedules are a little different on Saturdays and Sundays and these are also probably a little different.

Q. Would you say an average of 210 days for the seven months,——

A. Yes.

Q. That would give altogether for the seven months, with that many miles per day, about 108150 miles?

A. 108255 miles.

Q. This means then, if that is so, subtracting this 108,255 miles, from the 238,824 total, 120,569 miles that were put on elsewhere than on these lines and elsewhere than Park Point and the owl cars?

A. It would mean 120,569 miles put somewhere else.

Q. Well where, in your judgment? You are the manager of this plant and have been for thirty years, where did this go? Where did more than half of this extra car mile operation go other than on West Third Street?

A. I cannot now say. My impression would be that it was pretty well scattered.

Q. In other words you admit you increased the schedule generally over the City of Duluth without any authority of the City Council?

A. No I don't admit that we increased the schedule. These were not schedule trips.

Q. It was on West Third Street.

A. If we tried to operate on schedule mileage we could never carry the people and there would be no service. We have got to run cars on time.

Q. This is a comparison and is in excess over everything that you did in 1921?

A. Yes.

[fol. 826] Q. Can you conceive of any reason why there is any extra requirement that is fixed by any occasional sporadic run of a car in 1923 that would not also apply to 1921?

A. The only reason was a desire to reasonably accommodate the people.

Q. In other words you took the whole question of expense of operating this concern into your own hands without regard to any standard legal rate laid down by law?

A. No.

Q. With an increase of 12½% per year—if you can do that at 12½, why can't you increase that to 50% and come in and say why not put a rate on a rate base on an operating expense laid down like this without any authority of law at all? Is that the way you will treat the City of Duluth?

Is that the way the management treats the City of Duluth?

Mr. Carmichael: Objected to as not a fair question.

The Master: Well now, Mr. Richards, your claim is that the City Council in regulating the services fixed a maximum as well as a minimum?

Mr. Richards: Yes.

The Master: Regardless of the question of good faith the company would have no right to increase that maximum.

Mr. Richards: Exactly so.

Mr. Carman: The Commission will contend that in this proceeding the City of Duluth and the Street Railway Company ask to have a rate fixed upon a showing which included a schedule of service not including this increase which the evidence here has developed occurred since that time. And that in view of the conditions the order of the Commission fixing a rate of fare could not be set aside or enjoined or held confiscatory upon any showing of in- [fol. 827] creased operating expenses due to an increase of service, not presented to it and not contemplated, and occasioned either by the changing judgment of the parties as to what the service ought to be or by the necessity to meet the competition caused by the six cent fare, or any other cause, because the statute, the Brooks-Coleman Act, clearly contemplates that when any such change takes effect, application must be made to the Commission for a readjustment and the Commission cannot be enjoined, nor its established fare set aside in a federal court proceeding without such re-application and rehearing.

The Master: Now if we can get the total amount that this exceeds the schedule——

Mr. Carmichael: Mr. Warren is prepared to give the extra cost on Third Street, which is the only place that can be arrived at and also the additional revenue per car from Third Street.

The Master: Perhaps we ought to have the car miles required by the city schedule. Mr. Richards claims that that is the maximum. Mr. Carman claims that it is at least the maximum upon which the Commission bases its order and that it cannot be changed, whether in good faith or not. Let us get those figures down.

The Witness: Your Honor, we will then have to assume that the City's resolution, when it specified the service which was in effect on October 11, included all the extra cars that were then, on that day, being run as a part of the

schedule. We have never so considered, that it is a part of the schedule and that that is what the resolution meant that it should be the standard.

Mr. Mitchell: That resolution reads: "Resolved, that [fol. 828] the present schedule of the Street Railway Company be and hereby is established as a standard of service until such time as this Council takes further action in the matter, said standard being the schedule in force since October 11, 1920".

The Master: That is being accepted as the full schedule under the ordinance for the whole year of 1921.

Mr. Richards: It must be, because that covers the whole year and was the exact schedule in operation during that time.

The Master: I understand that it is the contention of the City that this is the full schedule required by the ordinance.

Mr. Richards: That is right.

The Master: Now if we can get the car mileage of the test period.

The Witness: From August 1, 1922 to July 31, 1923, the car mileage was 3,546,439. That is subject to correction,—if my addition is right,—or 236,207 more than during the year 1921.

Mr. Richards: Now deduct 10,000 for Park Point and owl car, would leave an excess, 253,270 which is larger than the base you have been figuring on on West Third Street.

Mr. Carmichael: And you have 108,255.

Mr. Richards: That is right.

The Master: Are there any other deductions from that under your claim, Mr. Richards?

Mr. Richards: We have got to modify on that basis of expense. If you multiply 253,270 by 3½¢——

The Master: Yes, but let us get these figures down. Are there any other deductions from miles?

Mr. Richards: No, that is all. It is a question over that 108,255, whether that is West Third Street. Deduct from [fol. 829] that the 108,255 of the West Third Street, and we get the net, the spread over the rest of the City. That leaves 144,952 spread over the rest of the City.

Mr. Carman: I understand that this shows that in the so-called test year ending July 31, 1923, the excess of car

miles over that contemplated by all the parties at the time the Commission made its order is 253,207.

Mr. Mitchell: No, that is not correct, we will not admit that was over the total car miles of 1921.

The Master: I think you have a right to explain in any way you see fit, but what Mr. Carman is trying to do is to get these figures. Let him get those things in his question and then you can come in and revise them if you wish.

Q. In other words, the normal car miles the Commission had before it at the time it made its order, at the time the statement was read into the record about the City Council's requirements was 3,283,232.

The Master: That is presented by the City as being the normal.

Mr. Carman: And the city exercised its authority to increase that on Park Point by the owl car to the extent of 10,000.

The Master: That is right.

Mr. Carman: But to no other extent, and that the Commission cannot be charged with having in contemplation any increase beyond that stated by the parties before it, plus that which the City has in fact made pursuant to the Brooks-Coleman law.

The Master: That is your legal argument.

Mr. Carman: Yes.

The Witness. I would like to have it understood that the car miles added on Park Point, 10,000 was only a very rough [fol. 830] approximation. It may be more than that.

Examined by Mr. Richards:

Q. I will call your attention to account No. 30, which as I understand is, by reference to complainant's Exhibit 37, passenger and combination cars, $54,959.64. What does that mean, that charge?

A. In what year do you get that amount?

Mr. Richards: 1922.

The Witness: You asked what that means, Mr. Richards.

Mr. Richards: Yes.

A. That is the cost of maintaining and repairing passenger and combination cars.

Q. Now you have a method of determining that cost per car mile.

A. Only by dividing the amount by the car miles during the period.

Q. I asked if you have a method of determining that?

A. I say that is the only method I know of.

Q. Well you have a theory, a practice?

A. If we wanted to know how much that amounted to by car miles we would divide it by car miles operated.

Q. And that method would produce such cost, if it were admitted, in the use of this 253,207 miles extra above the amount fixed by the City of Duluth.

A. That will take a good deal of computation in the first place—1.69 I make it, $4,279.20.

Q. Now passing to account No. 70 in Complainant's Exhibit 37, carhouse employes, $26,863.71, I asked if there is any method of determining how that is affected by these extra car miles of 253,207, and if so please state it in dollars and cents.

A. I know of no way of determining that. I doubt if it is affected at all by the car miles. It may be affected by the [fol. 831] number of cars in operation but not in car miles. That is mostly employes engaged in cleaning cars, in taking them in and out of the houses and yards, and that is not increased by the increase in car miles.

Q. How about car heating in the effect?

A. That is not very greatly increased by car miles because the cars are heated from the beginning of the heating season until the end, whether they are in operation or standing in the yard. It may take a little more coal when they are in motion but that is all. Fires are kept constantly.

Q. Haven't you a method of determining the cost of the upkeep of the maintenance of the track based on car mile use?

A. No, no. All we can do is to ascertain how much that amounts to per car mile, but how much it is affected by increase or decrease in the car miles is very hard to ascertain. I have no way of doing it.

Q. What is your judgment as to the proper amount to be charged up here by virtue of the increase necessitated for maintenance of the rolling stock in the cars making these trips necessary to cover the 253,207 extra car miles?

A. That is the item we just computed and is, I think, affected more directly by the number of passengers carried than it is by the car miles. The more passengers and more weight on the cars, more frequent stops.

Q. Well do you know how much you charged in this test period of 12 months ending July 31, 1923 for track maintenance?

A. Now, Mr. Richards, we were using the figures for the calendar year first. Do you want to go to the test period? The first figures we used from Exhibit 37—now you ask me about exhibit 38.

[fol. 832] Q. Well, how would you go at it to determine the proper difference for track maintenance on this basis of extra use of the tracks in running 253,207 car miles extra?

A. I don't know that I can ascertain that very satisfactorily. There is no question but the tendency is for the maintenance of the track to be increased somewhat by use of more car miles. Whether it is in direct proportion to the car miles is another question. I doubt it. A change of the maintenance is due to the work of other regular traffic and age and many other things.

Q. What is the figure that you charged up for the maintenance of tracks in the year 1921?

A. That is another statement. On City's exhibit A it shows the total of Way and Structures and that indicates something more than track.

Q. What else besides that?

A. Buildings of all kinds.

Q. And isn't it separated as between tracks and——

A. It is separated in the 28 sub-accounts.

Q. It seems to be there is a way of getting at the maintenance of track in 1921 which would be a normal year. If we compare maintenance of track as you figure out for this test period, there is a way of comparison so we can determine what the difference would be and also it involves the consideration of maintenance of track in 1922, all these three years and periods to be taken into consideration on that basis,—I would like to have that reached and stated.

A. Well I would want to take considerable time before I attempted to compute that cost of maintenance, tracks alone, or get at it from your statement.

Mr. Mitchell: I suppose it is entirely possible that the track was better maintained in one period than in another.

A. There is a vast difference in different years.

[fol. 833] Mr. Mitchell: You would likely spend more money on the tracks when you had it to spend?

A. That is true.

Mr. Mitchell: Although you probably didn't spend any more than you needed to.

A. We did not spend any more than we had to.

Mr. Mitchell: If you spent a little in 1921, you might have to spend more in 1923?

A. Yes.

Mr. Carman: I would suggest that Mr. Gifford and Mr. McWethy and Mr. Warren get together and see if they can agree on the figures as to the increased cost for the increased car miles, the total; and see if it can be agreed on and put it in the record flat, and all these other computations then may be unnecessary.

The Master: That would be satisfactory, or if they cannot agree, why not have Mr. Gifford and Mr. McWethy put in their tables and if plaintiffs desire to contradict it, let them do it.

Mr. Mitchell: Mr. McWethy has already given his idea in his early exhibits.

Mr. Richards:

Q. You testified on Saturday that you were of the opinion that those 62 extra trips paid for themselves.

A. I did, I believe.

Q. You were asked to produce your records to prove that statement, have you any such records?

A. I have a memorandum that I will be very glad to produce.

Q. I suppose this same account would relate not only to the 108,000 car miles on West Third Street, involving those [fol. 834] 62 trips, but also the total of the 253,207 extra car miles?

A. I think it would, because I am very sure we did not put on any car miles that were not needed, and that did not produce some extra revenue.

Q. That is the cars on any occasion, put on extra, carried some passengers?

A. Yes.

Mr. Mitchell:

Q. Is that your thought?
A. Yes.
Q. Enough to pay for operating the cars?
A. I would think so; in most cases, anyway.
Q. If there is a concert at the Armory you would run extra cars, for instance?
A. We do and always have.
Q. Were those cars well filled?
A. Usually they would be, not always.
Q. What other kinds of occasions would cause you to run extra cars?
A. In the summer time, celebrations and picnics, to the parks, the circus, we don't run as many as we formerly did to the theatres in the evening, but we run some.
Q. With special attractions at the theatres, you would sometimes run extra cars?
A. Yes, sometimes.
Q. Was that the practice during 1921?
A. It always has been.
Q. If there are special attractions anywhere on the line of the company where people are likely to congregate, has it always been your practice to run extra cars?
A. Yes.
Q. Well now, did you, during this year—was there any extra service, other than that upon west Third Street, that you were telling about, and that order of the Council, except the kind of extra service that I have been mentioning?
[fol. 835] A. There was none other. That was the only kind of extra service given.
Q. Well, if there was some special occasion——
A. No. I won't say that exactly. There might have been some changes in the day traffic on some of the lines that necessitated a change. Sometimes a reduction, sometimes an increase, sometimes a change in the way of extra cars.
Q. As I understand you have already testified with reference to West Third Street——

Mr. Richards: I have not finished yet.

Mr. Mitchell:

Q. Well, just as to West Third Street. You testified that in your judgment you are prepared now to more fully

present evidence. Do you think that service was given, without any substantial or perhaps any actual cost to the company?

A. It is my belief that the putting on of that service increased the net operating expense of the company.

Q. And you have given that some further consideration since it first came up here?

A. I have and it has confirmed my idea.

Q. And you have a memorandum that discusses the question?

A. I have.

Q. Then the other extra service and all extra service that was given, as I understand, consisted of extra cars run to take care of some unusual crowd, some unusual number of people at some point on the lines?

A. Yes.

Q. And always, or usually, at the request of somebody connected with it?

A. Very frequently, most usually at the request of someone. Those requests we get almost daily.

Q. And to render that sort of special service has been [fol. 836] the practice of your company ever since you have had anything to do with it?

A. It has.

Q. The number of such special cars would depend of course on the special occasion?

A. The usual practice is that someone notifies us of some particular attraction and requests extra service, and we reply that we will have the traffic watched and we have our men watch the outgoing traffic early in the evening, and if it is unusual we order out special cars to take the people away.

Q. Is the attempt made to have only so many extra cars as will accommodate the crowd?

A. That is the attempt alawys.

Q. Take such of the concerts as were given, course concerts——

A. Miss Richards concerts.

Q. Miss Richards concerts—you would undertake to have some sort of an idea about how many cars would be required?

A. At the close of the performance, at the time the people were going, that would be enough time.

Q. That is you could usuall- get the crowd there with the extra service?

A. Yes sir.

Q. Well some man connected with the service would undertake to make a guess?

A. He would count the passengers alighting from the cars at the point and find out the time the performance would close and have the cars out to meet the people coming away.

Q. So that you might have three or four or half dozen——

A. Yes for any crowd.

Q. Cars there waiting to take care of the crowd?

A. Yes sir.

Q. That has been the practice of the company during all those years?

A. Yes.

Q. The necessity for extra cars grows out of the fact that all of the people come out of the building at the same time, and all want to go home at the same time?

A. Yes.

[fol. 837] Q. And you cannot string them along over the regular service as you did in getting them there?

A. Yes.

Q. Now I understand about the West Third Street. You spoke about some possible change of service—I don't quite understand—that might change the number of car miles, and this suggestion has been made that the situation in the operation of the Minnesota Steel Plant had an effect on the number of cars necessary?

A. It does affect it. There has been a change there recently, on account of their employes going on the eight hour shifts. Before that change was made the superintendents called us up and asked us to rearrange our schedule so as to meet that condition.

Q. Were you during 1921 and in prior years making such shifts as that from time to time to accommodate the local conditions?

A. Yes.

Q. So that making those little adjustments to accommodate the Minnesota Steel Plant,—is that something that has had its origin since the order of the Commission?

A. At one time it was our daily practice to have as many as thirty cars out at the shops. That was prior to this order.

Q. What I am getting at there has been no change in your practice other than that, that might be claimed from West Third Street—no change since the order was made.

A. If any change was made they would have to buy more cars to put on any more service than was actually demanded.

Examined by Mr. Carman:

Q. Do you mean to testify that you have put on in this extra car service that we now have under consideration, the test year so-called, 145,000 car miles more that was required in 1921 for the same kind of extra service—you put on 108,000 on the Third Street line?

[fol. 838] A. Whatever was put on was put on in just the way and for the purpose I have stated.

Q. Well you put on 108,000 on West Third Street line. You put on 253,000 all together.

A. Yes.

Q. There is a difference of 145,000 car miles. Do you want to be understood as testifying that that 145,000 miles was for concert business and theater business and special extra business in excess of all of that kind of business that the Company took care of in 1921.

A. It was all for that, or for changes in conditions at the rush hours.

Q As a matter of fact don't you know that you put that on to meet jitney competition?

A. No I don't. We did not think of jitney competition except in the case of the Third Street line.

The Master: I am not sure that I have not misled you in the figures I have given you. The 108,000 was for the first seven months of 1923. The test period begins in August 1, 1922. I don't know when the Third Street line was ordered, but if it was ordered during 1922 our figure of 108,000—is that right?

Mr. Carman: I understand the testimony to be that the 108,000, he claimed that extra car mileage was put on the Third Street line.

The Master: For the first seven months of 1923. The test period is five months from there, to August 1, 1922, and if the Third Street line was increased during that time, our figure of 108,000 is right for comparison with 1922. If you are going to compare the test period with 1921 you must take a full year, August 1, 1922 to July 31, 1923.

[fol. 839] Mr. Carman: Well can we have the exact figures on the time that this service was put on West Third Street?

A. The service was put on the West Third Street line on November 27, 1922.

Q. That would make 124,000 car miles as accounting for all the extra service on the West Third Street line during the time. That deducted from 253,000 would be 129,000 extra car miles. That is the question that I want to know whether we are to understand that the business of concerts and theaters and special extra business was so much better in the test year ending July 31, 1923 than it was in 1921 that it required 129,000 more car miles?

A. Whatever the difference was.

Q. Notwithstanding the fact that in 1921 you had all this extra car service of the shipyards which you did not have in——

A. We did not have that in 1921 at all.

Q. None of that in 1921?

A. No I didn't testify to that.

Mr. Mitchell: You didn't include all the elements that Mr. Warren was testifying about.

Mr. Carman:

Q. We are still to understand that there is an increase in the special line of business justifying 129,000 car miles in the volume of business of this year over 1921?

A. I do not know where you get that 129,000, or whatever increase it was was occasioned by the amount of extra service.

Mr. Mitchell: It included also any change occasioned by shifts, such as at the steel plant?

A. Well that would be one of the elements.

Mr. Mitchell: He is limiting it to theatres and concerts.

Mr. Carman: Now with these special extra occasions, the theaters and concerts and these extra occasions, necessary

[fol. 840] to haul out the cars, if that kind of business is increased to that extent since 1921, is it reasonable to suppose that we might expect it to increase right along?

A. I don't know.

Q. Isn't it a fact that some of these cars, accounting for this extra mileage, were put on as jitney chasers?

A. I have said that there has been no jitney competition for sometime except on the Third Street line and on the Duluth-Superior, line, running down Superior Street there has been no extra service on that line at all; certainly not for that purpose.

Q. Wherever this jitney competition exists, it is a fact that people can ride for five cents, while they have to pay six cents if they get on the street car?

A. I understand the jitney fare is five cents for a short haul.

Mr. Mitchell: It has just been suggested to me that during the large part of 1921, the Minnesota Steel Plant was practically shut down?

A. I believe that was so.

Mr. Mitchell: If that was so and it was not shut down during the test period, might not that account for a large part of it?

A. For a very large part of it.

Mr. Carman: That might account for this difference in the 1922 mileage too, taking 1921 as a basis, because it was normal——

A. 1922 showed a decrease as compared with 1921.

Mr. Mitchell: When did the steel plant start up?

A. Sometime in 1922.

Mr. Mitchell: It had been specially active during a part [fol. 841] of this past year?

A. Yes.

Mr. Mitchell: So you had to run a large number of cars to take care of the men during a part of this year?

A. Yes.

Mr. Richards: You say you made shifts to accommodate the steel plant. What time are you referring to when you mention that item?

A. There was a request just a few weeks ago.

Mr. Richards: That is just recently. That is not within this period that we are talking about, is it?

A. No.

Mr. Richards: And not prior to August 1——

A. No. It would not be.

Mr. Mitchell: Well did you, as they started up and became more active, decide it was necessary to run more cars to take care of the men?

A. Yes sir.

Q. So that the number of cars operated to Morgan Park were increased when they started up new operations?

A. Yes.

Examined by Mr. Richards:

Q. Will you produce your schedule on which your cars were running as revised in October 1920 and as confirmed by the City Council's resolution of August 1, 1921 and that of August 1, 1923.

(The present schedule was marked Exhibit T. The schedule of October 1920 was marked Exhibit S.)

Q. Referring to Exhibit S, will you state whether that is a true and complete schedule of the operation of the Company?

A. I believe it to be.

Q. As of October 1, 1920?

A. Yes.

Q. That is the one that was made incident to the Council's resolution of August 1, 1921, referred to, and adopted?

A. It is.

[fol. 842] Q. All right. Handing you the City's Exhibit T, what is that?

A. That is the schedule which is in effect today and has been since September 1. It is corrected to September 1, 1923.

Q. Well there was an intervening schedule, wasn't there, or does this represent the change that you made in the schedule that you have spoken of and testified to as to the West Third Street line?

A. There may have been intervening printed schedules, but there would be very little difference.

Q. I would like to have you produce all the printed schedules that your company had been using between October 11, 1920 and the present time, if you please?

A. I will do that if I can find it.

Examined by Mr. Mitchell:

Q. You were asked as to schedules and you answered as I understand it that this did not purport to cover the extra service?

A. It did not. Our printed schedules never have.

Q. But that extra service as rendered, was rendered over a long period?

A. At all times.

Q. The printed schedule is simply the basis?

A. It is the base of our schedule.

Examined by Mr. Richards:

Q. I will ask you how long was Exhibit S the October 11, 1920 schedule, in operation and effect?

A. It has been in effect continuously up to this time and it is very little different with the exception of minor changes, and for a minute or two in a car owing to some changed condition. The frequency of the cars has remained the same.

Q. Referring now to City's Exhibit T which purports to be a street car time table of the Duluth division cor-
[fol. 843] rected to September 1, 1923, when was the correction made that is evidenced in this City's Exhibit T?

A. I don't know.

Q. Can you call our attention to the particular schedules that have been changed?

A. No, I cannot do that. The only way that I could do that would be by comparison.

Mr. Richards: I wish you would do that, it would save us some time later in the investigation.

Mr. Carmichael: The Exhibits speak for themselves.

Mr. Richards: I think that is all at the present time. We offer those in evidence, S and T as a part of the cross-examination of Mr. Warren.

Mr. Carmichael: No objection on our part, if anybody considers them relevant.

Examined by Mr. Carman:

Q. Didn't you testify earlier in this hearing that you put on jitney chasers?

A. I did not mention jitney chasers.

Q. If you don't like the term, didn't you testify early in this hearing that you put on added cars to meet jitney competition?

A. I said that we put on extra service, that we were discussing, on the West Third Street line, partly to meet jitney competition on that line.

Q. Not any place else?

A. I said we did not put on any extra service any place else.

Q. No place except the West Third Street line?

A. That is correct.

Q. You said a moment ago that jitney competition existed only in one or two places. Are we to understand that it is now decreasing?

A. No, there is no material decrease. The jitney routes are now the same as they have been for a very long time [fol. 844] and they are mostly on Third Avenue east and the downtown section to Fifty-seventh Avenue West on Third, and there is a line running about Third Avenue east, I believe, and Superior.

Q. They make that route for Fifty-seventh Avenue West?

A. They carry passengers that distance for five cents.

Q. Do you know of any place they carry for more than five cents?

A. I don't believe they regularly charge more than five cents during the day time, but they charge all they can get on special occasions, or they discontinue entirely, or go where the picking is good.

Q. They only charge five cents in competing with the street cars?

A. I have understood that that was their method.

Examined by Mr. Richards:

Q. Wasn't it your claim in your testimony before that jitney competition was unfair in picking up the cream of the business on the short haul?

A. Yes.

Q. This competition that yuo refer to is a haul that requires car mile run of eight miles?

A. I don't know what the distance is from Third Avenue East to Fifty-seventh West, however, I don't believe that all the jitneys go to Fifty-seventh Avenue West. I think

that only part of them go that far. Some of them turn back at Twenty-ninth Avenue.

Mr. Mitchell: That would be only about five miles.

A. I think eight miles is the round trip.

Q. That is true, eight and three tenths miles is the round trip.

A. That is a very short haul compared to eighteen miles.

Q. But you recognize that you are not losing on that, you are losing by competition on the long haul?

[fol. 845] A. There never has been any jitney competition on our long hauls.

Q. Isn't that a long haul, four miles from West Duluth to the center of the city?

A. Not in comparison to ten miles.

Q. You testified that that was the cream of the business?

A. Undoubtedly what caused the jitneys to go there was that it was the cream of the business at that time; and our records show that we had more passengers per trip there than in any other section of the city.

Q. As a matter of fact isn't this the situation—that it is a habit of the people in West Duluth in the evening, to a very large extent to come down to the various stations of entertainment; and to business when business is open, and that that is the reason you established a schedule for four hours of five-minute service, between eight o'clock and midnight?

A. There is a very considerable traffic on that Third Street line between eight o'clock and midnight.

Mr. Richards: I think that is all with the reservation that the things be produced that have been asked for.

(At this point an adjournment was taken until nine o'clock A. M. of the following morning at the same place.)

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[fol. 846] Duluth, Tuesday, Sept. 11, 1923.—10 a. m.

Pursuant to adjournment, the parties met, and the following proceedings were thereupon had:

HERBERT E. WARREN, recalled, testified:

Examined by Mr. Richards:

(Paper marked City's Exhibit U.)

Q. I show you, Mr. Warren, City's Exhibit U, and ask you what that is.

A. It is a memorandum showing the division of 1922 operating expenses between fixed and variable expense, by major accounts, and also shows the car miles run in 1922, and the amount of said fixed and variable expenses separately, per car mile.

Q. Now, is it a fact that by multiplying this factor of .1665 stated at the bottom of the second column, as against the 253,207 car miles shown as a net excess (that is, from November 27, 1922, to July 31, 1923,) would produce an amount which would show in dollars the excess operating costs for that period?

A. I think that is correct except as to the statement of the time covered by the excess mileage.

Q. In what respect would that not be correct?

A. The difference in mileage amounting to 253,207, is the difference between the mileage for the year ending July 31, 1922, as compared with the year ending July 31, 1921.

Mr. Carman: Was not that the calendar year of 1921?

A. No, no. There is a difference of 263,207 miles between the 12 months ending July 31, 1921, and the twelve months ending July 31, 1923, and from that we deducted the approximation of the Park Point mileage, and found a difference of 253,207 in mileage, exclusive of the Park Point mileage.

Q. You say you are not comparing for the calendar year [fol. 847] of 1921, but for what period?

A. For the twelve months ending July 31, 1923, as compared with the twelve months ending July 31, 1921.

Q. And that is based on actual figures in the evidence covering those two periods?

A. Yes.

Q. Will you please state what this increase in operating cost would be, using the factor of .1655 (.1665?) as applied to the net excess of car miles of 253,207?

A. The amount in dollars and cents would be $42,158.69.

Q. Now, Mr. Warren, that is only for eight months and three days, 8-1/10th months. Equating that for the twelve months, please state the amount that it would equal.

A. That is not for a fraction of the year. It is for the entire year. The mileage used is the difference between the mileage during the year ending July 31, 1923, and the year ending July 31, 1921, if I am not very much mistaken.

Q. Well, you didn't increase the schedule until November 27, 1922. This increase of schedule has only been in operation for eight months and three days.

A. The increase we talked about on Third Street was made on November 27, 1922, and has been effective since that time. But it was your suggestion that we use the year 1921 as a standard.

Q. All right. We will take the 108,200——

A. I arrived at those figures in answer to your question yesterday.

Q. All right. Calling your attention to City's Exhibit Q. Now, will you please note the car miles indicated in October, November and December, 1922. You will note, will you not, that the car miles for November are less than those for October?

A. Yes.

Q. By approximately 6,000?

A. Yes.

Q. And the car miles in November increased approximately 27,000?

A. In November,—no.

Q. In December?

A. Yes.

Q. Now, that was when your increased schedule was put into operation?

A. That was after the——

[fol. 848] Q. Three days after it was put into operation?

A. Yes.

Q. Covering down to the period of July 31, 1923, there was a continual increase, wasn't there, in car miles operated in all those months, as compared with anything prior to November, 1922?

A. Not a continuous increase.

Q. An actual increase?

A. There was a decrease in April as compared with March.

Q. You mean as compared with October, 1922?

A. As compared with October, the mileage in all those months is greater.

Q. It was always in excess of what there was in October, 1922, isn't that right?

A. Yes.

Q. And we have figured out an excess. Isn't it a fact that this net increase of 253,207 has occurred even in that subsequent period from November 27, 1922, to July 31, 1922, and if not, why not?

A. All I can say about the 253,207 miles is that it is the result of deducting 10,000 from 263,207 miles, and that the 263,207 miles is the difference between 3,283,232 miles which was the mileage for the calendar year 1921 from 3,546,430 miles, which, according to my figures here, was the mileage for the year ending July 31, 1923.

Mr. Carman: It is a fact, is it not, that practically all that increased mileage occurred in the last eight months of the calendar year ending July 31, 1923, and that the other mileage, before the commencement of those eight months, or December 31, 1922, was normal?

A. It is very difficult to compare that way, to compare months of one year that do not correspond with months in the other year. We compared yesterday two periods having entirely different endings, one ending in the middle of the year, and the other ending with the end of the calendar year. If you want to compare the first two or three months of a period with the first two or three months of the other period, that can be done.

[fol. 849] Mr. Carman: Suppose you make a comparison, if you are not willing to admit that, of the last eight months of the year ending July 31, 1923, with the last eight months of the year ending July 31, 1921, and see if you don't get practically the same figures that you have here, on the different years.

Mr. Mitchell: Cannot you make all these tabulations yourself in your brief?

Mr. Richards: We could but we don't want to. We would like to let it take its course as it is now.

The Witness: By comparing the last eight months of the period ending July 31, 1923, with the last eight months of the calendar year of 1921?

Q. The last eight months of the year ending July 31, 1921. What I am trying to get is a comparison of the last eight months of the same two years that you have made a comparison in before.

A. That is exactly what I am giving you. It is the last eight months of each period.

Q. You have been stating this morning that the period used was the year ending July 31, 1921, compared with the period of the year ending with the 31st of July, 1923.

A. No, I beg pardon. I stated the comparison between the calendar year, 1921. I said it is the calendar year 1921 and the eight months ending July——

Q. Let us have it understood that the time in which the comparison was made, shows a difference of 263,207 car miles for the whole year?

A. That is what I stated.

Q. Now will you give us the difference in the last eight months of those two years in comparison—the corresponding eight months of each period?

A. Tell me just what parts you want compared.

Mr. Carman: Your first comparison was a comparison of the year ending July 31, 1923. with the calendar year 1921?

A. Yes.

[fol. 850] Mr. Carman:

Q. Now the last eight months ending July 31, 1923, begin with December and end with July, don't they?

A. Yes.

Q. Well it is that eight months that I want compared with the last eight months of the year, the calendar year of 1921.

A. That is exactly what I figured.

Q. Well lets have it.

A. I find the difference there to be 263,332 miles, as compared with the former comparison of 263,207, a difference of less than 200.

Mr. Richards: Why shouldn't you add, if that is for eight months, why shouldn't you add 50% and have it for twelve months, so that the sum you stated at approximately 42,000,—why shouldn't that be increased 21,000 for the

whole year, showing operating cost of approximately of $63,000 for a twelve months period owing to this excess rate? Is there any reason why that is not proper?

A. If you want to do that, it is all right. That is the difference during twelve months, and it is also the difference during eight months, practically the same.

Mr. Richards: They would correspond, however?

A. Yes.

Mr. Mitchell: Mr. Richards understood you to say it was all right at $63,000 and you say the difference for twelve months is practically the same as for eight months—you don't understand.

A. That is true. If that difference did occur in eight months, he wants to know what it would be if it had occurred four months earlier than it did.

The Master: Whether this $63,000 was the total of that cost, or the $42,000. Was the operating expense $63,000 during the year ending July 31, or was it $42,000?

A. $42,000, but that has been increased.

Mr. Richards:

Q. My point is this just let it run four months more and it would be $21,000 more.

[fol. 851] The Master: Yes, but we haven't got that four months more. We have the year ending July 31st and the total of that year is $42,000.

Mr. Richards: I will admit it is argumentative.

The Master: If it went on for a year that way, everyone would concede it would be that much.

Mr. Carmichael: Is it $42,000 Mr. Warren or is it this 253,207 multiplied by .1665¢ per mile, according to the figures the engineers arrived at last night?

A. Yes. That is what gives the $42,000 and that is all the increase that has taken place so far.

Mr. Richards:

Q. Referring again to City's Exhibit U I ask you if this figure .1665 was agreed to between your company and the engineers for the State and the City as approximately correct?

A. That was the figure that we arrived at last night and agreed to as representing the cost per mile of the variable items of expense.

Q. And all these other figures on Exhibit U were also agreed to, as I understand.

A. No. I believe them to be correct. I do not know as we had any agreement to them. That is your exhibit. The rate .1665 was agreed to.

Q. Now I will ask you what was the result of your comparison of the amount, the value of securities that the company had on hand January 1st of those two respective years?

A. On January 1, 1922, the Company had $162,448 in securities; $135,363.08 in cash; a total of $297,811.08. On January 1st, 1923, it had $165,787.05 in securities and $122,072.27 in cash, a total of $287,859.32.

Q. As far as the securities are concerned you had more on hand.

A. A very slight increase in securities, but a very material decrease in cash.

Q. A total net difference of about $10,000. Were there [fol. 852] any other schedules, then, that you were asked to have of changes, except the City's exhibits S and T, which you found?

A. Printed time cards?

Q. Yes.

A. Yes. I found, I think, all the printed time cards, except one. I could not find that.

Q. What others did you find, other than the City's Exhibits S and T.

A. I found no more copies of Exhibit S, which was the time card No. 31 effective October 11, 1920. That is the only one in existence so far as I know. Then I found other time cards running consecutively with out No. 31, on from that number, beginning with 32, to No. 40, which is Exhibit T, with the exception of No. 38,—that we could not find.

Q. Exhibit T has a printed Number of 40?

A. Yes.

Q. And Exhibit S has a pencil number of 31?

A. Well I find now that 38 is an exhibit, so I am mistaken in saying that we did not find that. They all are included from 32 to 40.

(Printed time cards marked City's Exhibits V-1 to V-9 inclusive.)

Q. Showing you City's Exhibits V-1 to V-9 inclusive I will ask you Mr. Warren to state in general what those are? V-1 is what?

A. V-1 is a printed street car time card, time table of the Duluth division corrected to February 1, 1921. V-2 is the same corrected to August 1, 1921. V-3 is the same corrected to February 1, 1922. V-4 is the same corrected to May 16, 1922. V-5 is the same corrected to July 16, 1922. V-6 is the same corrected to December 1, 1922. No V-6 is the same corrected to September 16, 1922. V-7 is the same corrected to December 1, 1922. V-8 is the same corrected to February 1, 1923. V-9 is the same corrected to September 1, 1923.

Q. And V-9 is identical with City's Exhibit T?

A. Yes.

(City's Exhibit- V-1 to V-9 offered and received in evidence without objection.)

[fol. 853] Examined by Mr. Carman:

Q. You were going to get yesterday the actual charges to your depreciation account for bases of renewals during the year 1922.

A. Yes I have that.

Q. What was the amount?

A. To the end of 1922 the charges amounted to $670,492.78.

Q. Now will you give me the credits for the same period?

A. The total credits for the same period amounted to $1,683,569.20.

Q. How much of the $134,000 which you set aside for depreciation in the year 1922 was actually expended in replacements and renewals?

A. There was expended for replacements and renewals in 1921 $17,819.62. You referred to the amount of credits of 1921 when you said $134,303.81. You spoke of that as 1922 but it was the amount of 1921.

Q. Give me approximately the same credit in 1922?

A. In 1922 the credit is $135,742.59, and the debits for renewals $95,472.46.

Q. Now in the matter of income taxes you pay for federal income taxes as an operating system, your payments being made through the forms of the Holding Company operating both the Duluth and Superior Divisions?

A. The payment is based on the consolidation, and includes both.

Q. Both Duluth and Superior?

A. Yes.

Q. And the actual amount paid for the calendar year 1922, after deducting a proper proportion for non-operating income, actually amounted on the system to $8,287.67 didn't it?

A. I don't quite understand what you mean by saying after deducting the non-operating income.

Q. Well your total. You pay your total taxes. That in-
[fol. 854] cludes your non-operating and any other source of income that you may have so as to make up the total on which the taxes are computed.

A. Yes that is true.

Q. Well now, taking the amount which you pay on operating income of the system and excluding all other amounts that would amount to about $8,287.67?

A. If you took the amount paid on non-operating income and excluded the other amounts you would have the amount paid on non-operating income. I don't understand your question.

Q. Mr. Warren, I hand you Commission's Exhibit FF and call your attention to the first column of figures and ask you to state whether or not that shows a proper set-up of the gross operating revenue, operating expenses, state and local taxes and the net operating revenue, the non-operating revenue, gross income, the bond and other interest, the bond discount amortization allowed by income tax Examiner Westberg, and the total deductions, and the amount on which an income tax is computed for the Duluth division.

A. I don't know that it does, Mr. Carman. I recognize it as a memorandum made last night by Mr. Gifford. I have not had an opportunity to check it up. I don't know how ac-urately it shows these things. It is a fact that the saving in income tax by reason of the loss on the Superior division

was greater than the amount of income tax on the non-operating income.

Q. Mr. Warren, is this Exhibit FF a proper statement of the basis for computing income tax in accordance with the method outlined by the Master in this proceeding and earlier at a time when we were discussing income tax?

A. I assume if is approximately correct. As I say I [fol. 855] have not had a chance to look at it, but it appears to be approximately correct. I would not want to say it was correct.

Q. Well the figures for gross operating revenue for the Duluth division for 1922, $1,369,106.04, are correct are they not?

A. I could check all those figures by taking time. I didn't get my hands on this until two o'clock this morning.

Mr. Mitchell: Why don't you put this in subject to Mr. Warren's correction later, conceding it is right, subject to correction?

Mr. Richards: Well I will offer it in evidence with that understanding.

Mr. Mitchell: We have no objection, subject to the right to make any corrections if Mr. Warren finds that any should be made.

Q. I call attention Mr. Warren, to item Bond Discount Amortization, Examiner Westberg's figures, and ask you to state what that item consists of.

A. It consists of a deduction or a credit for income tax purposes allowed by Examiner Westberg of the Treasury Department.

Q. And it is equivalent to interest on indebtedness of the company in a general way?

A. It is deduction, and the interest is also a deduction to that extent. It comes in the same class-deduction.

Q. And that deduction is a continuing proposition, is it not, until the bonds are amortized?

A. No, I believe not. I believe there was some correction made. I think there will be less deduction from now on, that is my understanding. The Examiner made that deduction this year. It was made from this calculation.

Q. Can you give us any idea how much less?

A. No I could not.

[fol. 856] Q. A very gradual decrease, is it not?

A. No, it is a very material decrease. He had spread it over too few years, and he seemed to spread it over a great many more years, to make it a very much less deduction, so that the deduction would be greater.

Q. In paying your taxes as an operating system covering both Duluth and Superior during the year 1922, when you were experiencing losses on the Superior system, that resulted in reducing the total amount of income tax to be paid?

A. Yes, it did.

Q. And in about the amount stated here in this Exhibit FF?

A. I would think so.

Mr. Carman: I will state in the record that I ask this question merely to get the facts before the Court. Personally, it is not my inclination to contend that the Duluth division ought to profit by the gain that is made in the income tax because of loss to the Superior division, but I want to put the fact into the record.

Mr. Richards: That is the City's position also.

Mr. Carman: I want to state for the record that it is our claim that this Exhibit FF which sets up the income tax, computes the same for the year 1922 according to the method indicated by the Master at a previous time in the hearing as his view of the proper method of arriving at the income tax. That is all the cross examination I have.

Mr. Richards: I have nothing further from Mr. Warren. We will put Mr. McWethy on the stand.

[fol. 857] Mr. H. E. McWethy, recalled, testified as follows:

Examined by Mr. Richards:

Q. Heretofore, Mr. McWethy, in dealing with the proper annual depreciation, you have stated your views, and brought them out, and made some calculations, making adjustments, as applied to the annual operating expenses and net revenues, and have reached certain percentages of return upon those assumptions. Now I would ask you to

please state more fully to the Court your views and the reason for them, as establishing the proper annual depreciation charge, as heretofore intimated by you in your testimony.

A. On page — of my report to the Railroad Commission bearing upon the value of the property of the Duluth Street Railway Company (which is the Commission's Exhibit BB) in stating my opinion that 2.3% upon the investment in depreciable property was a fair and proper annual allowance as an accrual for depreciation. Computing that on the investment, amounted in total to $3,971,535, which resulted in a total annual charge of $91,345.30 as my estimate of the fair reasonable annual allowance for depreciation. I desire to point out that the Commission computed depreciation at 2½% of the depreciable proportion of the property, but it was 2½% not of the investment in depreciable property, but 2½% of the fair value as established by the Commission in that portion of depreciable property established by the Commission. Now in connection with my study which I presented to the Commission in a separate memorandum submitted to the Commission on May 23, 1922, I gave further reasons than were contained in my report to the Com- [fol. 858] mission (which is Exhibit BB in this proceeding)—for arriving at the conclusion that $91,345.30 was the proper annual charge. As a part of the study I prepared a curve showing essentially the rate of building up the depreciation reserve as compared with the rate of increase in book value of this property during the years from 1900 to 1921 inclusive.

(Blue print and curve marked City's Exhibit W, offered and received in evidence without objection.)

The Witness: I will quote from my memorandum to which I have already referred, submitted to the Commission on May 23, 1922.

Q. In so quoting, are you stating your own views now? That is, as applied to the situation——

A. I am.

Q. —as being true and correct? That is your belief as to the correctness of the views and conclusions; is that right?

A. Yes. It will be the purpose of this memorandum to analyze somewhat more in detail than is set forth in my

report, my reasons for concluding that 2.3% of the depreciable property is adequate for the annual requirements of this company. The analysis will be based upon the premises, first, that the present balance in the depreciation reserve, amounting on December 31, 1921 to nearly $973,000, or to 19.7% of the book value, fully covers existing depreciation on the property. Second, that this balance has been increasing in the past years at a high rate which now, since the reserve is adequate, need not continue in the future. My report shows that the accrued depreciation on the property (see Section 2, Exhibit BB) amounted to $749,620 on June 30, 1921. Comparing this amount with the actual balance in the company's reserve of $972,806.38 shows an excess in the reserve of $223,186.38. This satisfies me that the present reserve balance is at least ade-
[fol. 859] quate for the purposes of the company at the present time. We may now observe the rate at which this depreciation reserve has been set up in the past and basing our judgment partially on past requirements, determine at what rate the reserve should be accumulated in the future. The graph which I have prepared and which is City's Exhibit W, compares the rate of increase in the company's book value with the rate of increase of the depreciation reserve. The values for 1921 are taken as 100%, and the corresponding percentages are worked out for each of the preceding years for both depreciation reserve balance and book value balance. The graph shows that the depreciation reserve balances have increased at a much higher rate than have the book values, especially in the more recent years. It would seem that for the future we should make such allowances for depreciation as will make the trend of the reserve balance follow more closely the book value trend. Now that is, in effect, a summary of what is intended to be brought out by the presentation of this graph. My study indicated that an annual allowance for depreciation of $91,345.30 was adequate for the reserve, instead of the amount which the company actually accrued each year. In order to show what the effect the $91,345.30 of accrual would have been in the past years when substituted for the actual accrual made by the company, I have drawn on this curve a dotted line which shows what the average rate of building up the depreciation reserve would have been, had the reserve been built up on an accrual cor-

responding in per cent of book value to the ratio of $91,345.30 to the book value as of December 31, 1921. It will be seen that even on the basis which I have taken the depreciation reserve will be accumulating at a much higher [fol. 860] rate than will the book value increase. In other words, my account for depreciation will approximately split the difference between the rate of building up the reserve as it has actually been built up in the last ten or twelve years, and the rate of building up the book value during this period. I believe it indicates that my estimate of annual allowance for depreciation is fairly conservative.

Q. I ask you if it is not proper, in accordance with the rules of the Interstate Commerce Commission classification to accrue the depreciation to take care of the investment?

A. I believe that is true. Just a moment,—in connection with your last question: it is my remembrance of the Interstate Commerce classification that it uses the term Cost in connection with its discussion of the amounts to be set up for depreciation; and since Cost is synonymous with Investment, I would answer your question, Yes.

Q. Have you a reference to any particular rule by which you could verify at this time?

A. On page 19 of the Interstate Commerce Classifi-ation of accounts for electric railways prescribed by the Interstate Commerce Commission, effective on July 1, 1914, under Item 12, Property Retired and not Replaced, it uses the term "Ledger value of the property" as applied to dedepreciation. In my opinion that would be synonymous with investment or cost.

Q. Book cost?

A. Book cost.

Mr. Mitchell: Is there any reason why the books should not be corrected to show that, and that then would be the ledger value?

A. There is every reason why the books should not be corrected to reflect a fair value as established by any commission.

[fol. 861] Mr. Mitchell: Is that the only basis you have for thinking that it is proper to base your depreciation upon book value, rather than upon fair value as found by the Commission?

A. No sir. The depreciation reserve is designed to return to the investors the original cost of the property which they put in service for the public, and that only.

Mr. Mitchell: But if that original cost was in dollars and were now worth sixty-six cents, you have not returned on a full value. You have returned only sixty-six cent dollars.

A. The depreciation reserve does not in itself return to the investor property units. It returns to the investor dollars invested in property.

Mr. Mitchell: But if those dollars returned are worth only sixty-six per cent of those that were put in the return is not complete, is it?

A. I think it is.

Mr. Mitchell: You think it is?

A. Yes sir. The dollars invested in the property are returned to the investor and that is all that the company expect the depreciation reserve to return to him when he puts in a new unit of property to replace an old unit of property. If that new unit of property costs more than the old unit of property, then he may issue new securities to cover the extra cost of that new unit; and that is additional ledger value.

Mr. Carmichael: I suppose you would say that if a German should put in a million marks into an electric light plant in Germany in 1910, and now gets his million marks back, that he has been reimbursed for all that he put into that property?

A. Yes sir.

[fol. 862] Q. Well, if in considering your overheads, you should assume a construction which will be corresponding to the conditions, under which the property was actually produced and developed in Duluth, what length of time would you consider as a proper time as a base to figure overheads?

A. That is, you want me to state my opinion as to the length of time on the average that this property has been constructed in giving consideration to the fact that it has been construted over a long period of years and by piecemeal construction.

Q. Yes, that is it. Of course, the constructive period in Duluth is how long?

A. Well, as a matter of fact, most of the construction or all of the construction in Duluth is during the summer

months, and it is my opinion that very few if any units of property have taken more than one season of construction to complete them. As an actual proposition, I believe that six months' average construction period would certainly be a liberal estimate of the actual time which it has taken to build up the property of the Duluth Street Railway as it has actually been constructed.

Q. Assuming a six months' construction period, what would you consider the proper interest and taxes during construction to be?

A. Well, it would be one-fourth of the amounts which I testified to on the two year basis.

Q. And for interest and taxes during construction on the two year basis you put it at what per cent?

A. Assuming that the interest during construction would be at a seven per cent basis——

Mr. Carmichael: He went into all this the other day.

The Witness: I am explaining my answer. I arrived at 5.6% and that is assuming a two year construction period. Now on the basis of six months it would be one-quarter of [fol. 863] this or 1.4%.

Mr. Carmichael: Are you answering now to the effect that you think this property would be constructed in six months' time?

A. I didn't say that, Mr. Carmichael.

Q. That is not our claim at all. The claim is explained that the various units would not cover more than six months to complete, if completed piecemeal year by year. What would you figure on the basis of taxes and what modification would you make for the one-quarter of the time taken in construction, to that which you formerly made?

A. I estimated that on the two year basis a tax rate of 5.79, the per cent for taxes would be 1.85; were we to substitute a six months' construction period in place of the two year construction period, the result would be one-quarter of the tax rate which I assume and would result in approximately .46 of 1% and in dollars $16,575.

Q. And can you state in dollars and cents the difference in this method of allowance and the one you have testified to before on the basis of two year construction, taxes and interest—approximately? If you find .140% for interest,

and .46 for taxes, the total of the two would be 1.86 for the two?

A. Yes.

Q. You had previously found for interest 5.6 for interest and the tax 1.85 total 7.45. Is that right?

A. That is correct.

Q. Now your present assumption is 1.86?

A. On the basis of this assumption that is true.

Q. The difference will be 5.59?

A. 5.59 is correct.

Q. And before, in Exhibit BB you had the percentage stated as 13.3%.

A. Not for interest and taxes; for all overheads.

Q. For all overheads?

A. Yes.

Q. Making the deductions here, what would the net be [fol. 864] on the basis of six months' construction piecemeal?

A. It would be 7.71 as the allowance for general overheads, over and above the allowance for direct overheads of 7.31.

By Mr. Carman:

Q. In our recent question on the German finances, it is also your opinion that if a German public utility ten years ago issued bonds for a million marks, today they could pay off those bonds in marks today?

A. That is true.

Q. In your previous testimony in connection with Commission's Exhibit CC at page 47, you set up certain figures of variable expense showing that, according to your computation there, the increased car miles due to increased service about which we heard testimony this morning and yesterday afternoon, would amount to approximately $46,000?

A. Yes, that is true.

Q. And this morning you have agreed to an exhibit which places that figure at slightly over $42,000?

A. That is true. As a compromise, we fixed that as approximately $42,000.

Q. In connection with your previous testimony, Commission's Exhibit EE has been produced in evidence, show-

ing the various ticket fares and cash fares in a number of cities all over the country where rates were in effect permitting the sale of tickets at less than the cash fare rate. I will ask you if you have completed the average cash fare paid and the average ticket fare paid on all of the fares, in all of the cities, shown on Exhibit EE?

A. Yes I have.

Q. And what did you find that average to be in the cities?

Mr. Carmichael: Objected to as immaterial. It can form no proper basis on account of different conditions in various cities.

[fol. 865] Mr. Carman: That is just what we thought when the Columbus man was testifying.

The Witness: Well, it so happens that the average of all these companies, and there are seventy-two companies, and the straight arithmetical average of the per cent of riders who pay cash was 33.59%; and riders who rode on tickets was 66.41%.

By Mr. Richards:

Q. And this conclusion is based upon all this information that has been placed at the disposal of counsel on the other side with the original source of information derived——

A. That is true.

Q. And in part was furnished by them?

A. It was.

Q. Furnished by them to whom?

A. To me, as street railway engineer of the Railroad and Warehouse Commission.

Q. In your official capacity?

A. Yes sir.

Examined by Mr. Carmichael:

Q. Did you ever have any actual experience in the organization and construction of a street railway system?

A. No.

Q. Did you ever have any actual experience in the financing of a street railway system?

A. No sir.

Q. Did you ever have any actual experience in the operation of a street railway system?

A. No sir.

Q. But the other day you testified in answer to some of Mr. Richards' questions concerning going concern value. Do you recall that you did so testify?

A. I do.

Q. And eliminating certain things you arrived at a going concern value, building up a hypothetical organization of approximately $200,000?

A. Yes.

Q. Was anything included in that for securing business?

A. My assumption in regard to that——

[fol. 866] Q. Was anything included in that for securing business?

A. There was not. It was purposely excluded.

Q. You have answered the question. Was there anything included in that for loss of interest during operation?

A. No. I purposely excluded all normal losses, and loss of interest during operation would be one of those items which I considered in my report to the Commission, but which I was asked to exclude, for the purposes of my testimony under cross-examination, by Mr. Richards.

Q. The Commission in its order takes into account certain things to be considered in arriving at a going concern value. Will you please listen to my reading from the Order, Mr. McWethy, and when I conclude I will ask you if you think all of these elements should be considered in arriving at the proper figure for going concern value: "This includes such elements as the cost of creating the personnel of an operating force that is sufficient and the cost of attracting sufficient patronage to pay the operating expenditures. In an enterprise that requires contact between the company and its patrons by contract, there is some basis of figuring this cost of acquisition of business. In street car operation this cost is represented by costs of advertising and other manner of educating the people to using the car service which would probably include certain losses in a limited initial period." Do you think all those elements should be considered?

A. That is my idea.

Q. The question is, do you think all those elements should be considered? You can answer Yes or No.

A. Yes I do think all of those elements should be considered. If I may be allowed to elaborate——

Q. You have answered the question Mr. McWethy.
A. All right.

Q. That is all.

[fol. 867] By Mr. Carman:

Q. Mr. McWethy, you were asked a moment ago whether, in your judgment, the element of going concern values, or the measure of going concern value should be determined by a consideration of such elements as the cost of—the personnel of an operating force sufficient to attract sufficient patronage to pay the operating expenditures, and whether or not you approved the statement that an enterprise that requires contact between the company and its patrons by contract, there is some basis of figuring this cost of acquisition of business. That in street car operation this cost is represented by cost of advertising and other matters to educate the people to use the car service which would probably include certain losses in an initial period. And you had an explanation that you desired to make in connection with your answer to that question.

A. It seems to me that on the cost-of-reproduction theory, that you have to consider that the property is all ready to put into operation at a certain date and that your patronage is there ready to ride, that there will be very little of an advertising nature. The cost to attract the business to street railway property, while it is an element, would be a very small element. That is my opinion.

Mr. Carman: That is all.

Mr. Richards: That is all.

Mr. Carmichael: That is all.

Mr. Carman: The State offers in evidence all its exhibits. I simply make the offer in case there has been any omission.

Mr. Richards: The City does the same, but I think we have offered everything.

Mr. Carmichael: Objected to as incompetent, irrelevant, immaterial, no proper foundation laid, inadmissible under [fol. 868] the pleadings, hearsay.

The Master: Received, subject to the objections.

Mr. Richards: The City rests.

Mr. Carmichael: Has the State rested?

Mr. Carman: Yes, the State rests.

Mr. Carmichael: We offer Complainant's Exhibit 36, which has been checked by both Mr. Gifford and Mr. McWethy.

Mr. Carman: We object to it on the same grounds and for the same reasons which the Complainant objected to the introduction of Commission's Exhibit E; that is, that it is hearsay, and not properly authenticated, and is not correct evidence.

The Master: The exhibits will be received subject to the objection.

[fol. 869] PLAINTIFF'S REBUTTAL

HERBERT E. WARREN, recalled by the plaintiff in rebuttal, testified as follows:

Examined by Mr. Carmichael:

(Paper marked Complainant's Exhibit 39.)

Q. Showing you Complainant's Exhibit 39: Will you please state what that is.

A. It is a memorandum made to show the 1922 income and operating expenses of the Company as compared with the income and operating expenses as shown to be adjusted by Mr. McWethy in his statement. The adjustments are not admitted by the Company. Also, to show the calculations made by Mr. McWethy in estimating for 1922 a net revenue from operation of $254,107.26, compared with actual net revenue from operation at 5¢ fare of $154,089.46, and as "net revenue from operation of $254,107.26," so quoted from the Commission's order.

Q. The first column headed 1922 Income as estimated by McWethy on 5¢ fare, is the memorandum made by Mr. McWethy contained in Commission's Exhibit CC from which Mr. McWethy testified?

A. Yes.

Q. And the figure at the bottom of that column, "254,107.26, has a four-dollar correction included therein, that was made?

A. It has.

Q. So that the $4 correction, I suppose, checks out with the figure which the Commission estimated that the Duluth

Street Railway would earn during the years 1922 on the 5¢ fare?

A. Yes.

Q. And that was based on the Commission's estimate of 27,030,000 passengers to be carr-ed that year?

A. Yes.

Q. The second column, 1922 income actual as to expenses and taxes on a 5¢ fare, is shown, showing the actual operating expense of the Company during 1922?

A. That is shown in the second column.

Q. And when you come to passenger revenue, that is based on 5¢ fare on the actual number of passengers carried in 1922?

A. Yes.

[fol. 870] Q. And shows that with your actual expenses and the actual revenue which would have been derived during 1922, the company would have received but $154,089.46 as revenue from operations?

A. That is correct, or just $100,017.80 less than the Commission estimated.

Q. That is, the Company's actual experience at the 5¢ fare would have been $100,000 less than the Commission estimated it would have been?

A. Yes.

Q. Now, your next column, headed Decrease, shows a decrease——

Mr. Richards: All that is a matter of argument.

Q. Your third column, headed Decrease, shows the decrease in income as is evidenced by increased operating expenses, and the decreased income due to the lessened number of passengers carried under the Commission's estimate?

A. That is exactly what it showed.

Q. And also Mr. McWethy's estimate?

A. Yes. And it shows the amount of such decrease to be $131,638.50.

Q. And the fourth column, headed Increase, shows the increase in income caused by a reduction in various operating expenses as shown in that column?

A. It shows the increase in income by reason of the expenses having been less than the Commission estimated.

Q. And the total in that column is $31,120.70?

A. Yes.

Q. So that by subtraction from the last figure, we find the Commission over-estimated what the operating income would be by the sum of $100,017.80?

A. Correct.

Q. Mr. Warren, referring to Exhibits 37 and 38, the State and the City, in Exhibit 38, have criticised Item No. 12, being removal of snow and ice.

A. Yes.

Q. Where, in a test year (and by test year I mean the 12-month period ending July 31, 1923,) you have accrued into that fund $9,341.09?

A. Yes, actual expenditure,—not accrued.

[fol. 871] Q. What have you to say? Actual expenditure in the twelve months period? What have you to say concerning the snow and ice matter?

A. I have this to say that the Commission allowed $5,000 a year as reasonable average expenditure for removal of snow and ice, whereas I find that the average actual expenditure for that item over the past seven years has been $7,097.01, and the tendency is for it to increase as the business section enlarges, and the removal of snow covers greater territory. And I do not believ*d* that our snow and ice removal will run at under $8,000 or $9,000 in the future years.

Q. How much has the actual expense been for the first seven months of 1923 for removal of snow and ice?

A. $6,748.07.

Q. Mr. Warren, there has been some criticism of Exhibit 37 concerning Item 28 Equalization of Way and Structures, and in Exhibit 38 I notice that the same item is a credit. Please state what the situation is as to the Item No. 28, Equalization of Way and Structures.

A. The situation is this; at the close of the calendar year 1922, we had in the accounts $6,399.70 representing deferred maintenance, whereas since the end of the year we have made that all up and expended $2,142.10 besides.

Q. Is it your purpose and do you try to accrue into this account over a period of years what will be necessary for the purposes of that account?

A. We attempt to do that.

Q. And during the period of years you arrive at a balance?

A. It is almost invariably adjusted with the calendar year, but it was not for 1922. It is being rapidly adjusted in 1923 and will balance out at the end of the year. We are required to,—by the classification—to keep that account.

Q. What you have said relative to account No. 28, is that [fol. 872] true relative to account 44 which is equalization of equipment?

A. The same, identically, is true except as to the amount. The amount is somewhat less, that relates to equipment.

Q. I wish to call attention to account No. 30 shown in Exhibit 37 and account No. 30 shown in complainant's 38. There has been some criticism here that for the year 1922 account No. 30 showing $54,459.64, and in Exhibit 38, the twelve months test period, showing $61,600.40. I will ask you to state what was paid out on that account for each of the years 1919, 1920 and 1921.

A. In 1919 there was paid out and charged to account No. 30 $80,301.46. In the year 1920, $80,882.39. In 1920, $68,518.72. And those figures contain the same items of 37 and 38 and are actual expenditures by the company made in those years. They are such as might be affected by the equalization and adjustment.

Q. I wish to call your attention to account No. 92, on Exhibit 38, which is Injuries and Damages on Exhibit 38, the amount is $33,818.68. Mr. McWethy, in his testimony, seems to think that that ran no greater than $23,338, or some $10,000 less. What do you say about that?

A. The charges to account 92, in the year 1919 were $61,020.14. In 1920, $42,618. In 1921 and 1922 we were abnormally low, it being $17,287 in 1921 and as shown by Exhibit 37, $20,828.89 for 1922.

Q. What is the situation now?

A. Those charges are rapidly increasing at the present time and it looks as though the abnormally low period in 1921 and 1922 were over with.

Q. The abnormal period is over with?

A. Yes.

Q. The company is getting back to what existed in 1919 and 1920?

A. Yes.

Q. In your experience with this company over thirty [fol. 873] years, do you find that in some one year there will be an abnormal expense under some item and next year an abnormal expense under an entirely different item?

A. I have found that.

Q. Does that happen as a practical matter every year?

A. It does.

Q. And that must be taken into consideration in accruing the amounts of the various accounts for the years as you go along?

A. It must be. In 1922 the accruals are based on the actual occurrences of accidents and the estimated cost of such accidents. It is more accurate than an ordinary accrual, based on accurate conditions.

Q. Mr. Warren, on your depreciation account, where you have been accruing the charge of depreciation on the same basis for the year 1914 as being charged now. As a result of your long and active experience as general manager and vice-president of this company, do you think the company has accrued more depreciation than is absolutely necessary to have good property and for the proper protection of its property?

A. I do not.

Q. Has the question of the correctness of the company's charge for depreciation ever been raised by the accountants and inspectors of the United States Internal Revenue Department?

Mr. Carman: Objected to as immaterial and irrelevant.

The Master: Objection noted.

A. The Department has never criticised the expense. The only tendency has been—one time they claimed that the depreciation was not made sufficient, but it has always been accepted as being low enough; that is, there has never been any question as to the amount being more than sufficient.

Q. Mr. Warren, the question is raised here concerning a sum of money paid for the audit of the books, the claim having been made by someone that that was not a proper charge to operating expenses (the Pulaski-Spencer audit [fol. 874] which Mr. McWethy makes reference to on page 8 of Commission's Exhibit CC) I will ask if it is not the fact

that as a result of that audit you succeeded in adjusting a claim of the Government, where the Government was claiming $81,000 additional income tax, the adjustment being made by paying about $4,700 to the Government?

A. That is correct, except that I think the payment was about $8,000 as adjusted instead of about $4,000.

Q. But it did result in a saving and in a practical saving in excess of $70,000?

A. Yes.

Q. In answer to a question by Mr. Richards you stated that the additional trip service, which was made on the West Third Street line resulted in sufficient increased revenue to offset the cost of that service?

A. I so stated.

Q. Will you please go into detail on that subject and explain the reasons for your answer, giving such figures and the data as you have been able to procure from the books of the company and other information which you have at hand?

A. In arriving at that conclusion I considered the following figures from our records: First, prior to the increase in the extra service of November 27, there had been carried on the West Third Street line from 44½ to 39 passengers per one-way trip on the ten minute base headway during the non-rush hours; and there had been carried daily on the portion of the West Third Street lines affected by the increased extra service the following number of passengers by quarters: In July, 1921, 19,891. October, 1921, 18,473. January 1922, 18,974. April, 1922, 19,548. July, 1922, 18,952. It was about that time that the jitneys began to run upon Third Street, and in October 1922, the number of passengers carried daily dropped to 16,380. In the first [fol. 875] quarterly survey made after the change in service, the passengers had increased to 19,834 daily. They further increased in April 1923 to 20,222 daily. In July, 1923, to 18,138 daily. At the same time that that decrease was noted in the number of passengers carried on that line, there was no corresponding decrease in the passengers carried on the other lines in other sections of the city, and after the placing on of the extra service there was a less marked increase in the traffic on the other lines. The record of passengers carried immediately before and immediately following the increase in the extra service covering

the period between the quarterly service figures of a year ago, was as follows: In the week ending October 4, 1922 (these are revenue passengers and the other figures were total passengers), 64,049 carried in the week.

Q. This is limited to West Third street?

A. Yes, this is West Third street, and this is limited to the west end in West Third street, not being so easy to obtain the figures in West Duluth. However, figures include West Duluth. These figures are to show in the West end only to Fortieth Avenue. The week ending October 11, 65,161. Week ending October 18, 65,435. Week ending November 25, 65,724. The average for the four weeks immediately preceding the change in the service was 66,840. The average for the four weeks immediately following the change in the service was 72,494, and then following that and up to the time the quarterly figures give, the weekly record of passengers carried was as follows: The week ending December 27, 75,965. Week ending January 3rd, 71,796. Week ending January 10, 73,139. Week ending January 17, 74,085. Week ending January 24, 74,201. At the time that that very substantial increase in passengers carried on the West Third street line to the West end [fol. 876] took place, there was some decrease in the number of passengers observed riding in jitneys which were in competition with the service on that line. Summarizing, I found there was a decrease in the total passengers carried in the West end and along the West Third street lines from October 1921 to October 1922, from 18,493 to 16,380, or a decrease in the daily number of passengers of 2113 That was equivalent to a decrease of 11.4% in that section during the same time or between the same dates the decrease in the passengers carried on the entire Duluth division was equivalent to 5.8%. This indicated that there was a very marked decrease on the West Third street lines by reason of jitney competition which had begun. Allowing for the 5.8% decrease in the traffic on the other lines in Duluth, there should have been carried on the West Third street line 17,421 passengers in October 1922, daily. The difference between this number and the 16,380 was 1,041 daily and I considered that attributable directly to the effect of jitney bus competition. In January 1923 there were 19834 total passengers carried daily on the West Third street, in the West end, and in West Duluth, an in-

crease over October 1922 of 34561 equivalent to 21.1%; while on all lines in Duluth the increase was equivalent to 12.8%.

Mr. Richards: Do you mean on all through lines?

A. In this case all lines. I checked all lines for the reason that it was not easy to check the through lines, exclusively, and the result of taking all the lines would be to do an injustice in this estimate and underestimate rather than overestimate the effect of the change. It did not make a very great difference, but whatever difference it did make would be against us.

Allowing for the 12.8% increase in all lines, there should [fol. 877] have been carried on the West Third Street line 18,476 daily, and the difference between this number and the 19,834, which was 1,358 daily, I considered to be the very least that could be credited to the added extra service on the West Third Street lines between October 1922 and July 1923. It seems reasonable to suppose that the added service not only brought about the abnormal increase of 1,358 passengers daily, but that it prevented further gradual diversion of traffic to increase the jitneys, the jitneys then increasing in number. In the quarterly figures for April 1923, as compared with October 1922, there was an increase on all lines of 7103 passengers, equivalent to 10.9 per cent, which, if applied to the west end and West Duluth passengers along Third Street, would give 18,165 for April; but there were actually 20,222 carried, which was in excess of 2,057. All these figures are daily. The same figures apply to July 1923 as compared with October 1923 figures, show an excess of 12,018 daily on the West Third Street line; in other words, an excess in passengers that could be accounted for in no other way except that the increase in the non-rush hours service had taken those away from the jitneys. From all the above figures, it seems reasonable to assume that the West Third Street lines carried not less than 1,500 daily, since the addition of the extra service, that would have been carried in jitneys if the extra service had not been put on, and the jitneys have been estimated to take all the passengers that accumulated in the ten-minute gaps in the non-rush service. Assuming the same proportion of revenue passengers to total passengers as on other lines, which is 84%, the 1,500 total passengers would be

equivalent to 1,260 revenue passengers, which, at 6¢ would give $75.60 per day, daily revenue as the very minimum increased revenue by reason of the putting on of those [fol. 878] extra cars, the added service. And computing the cost, I find that the additional wages paid motormen and conductors on account of the additional service on Third Street was as follows: The pull-outs or trippers which were absorbed in the new service amounted—car hours daily—to 14.7, and the wages amounted to 20.38, which was at the rate of 1,386 per car hour. The added service consisting of 53.6 hour service, 515½ miles of service, and the wages paid amounted to 49.41, which would be at the rate of 92.2¢ per car hour, and 9.58¢ per car mile. The wages total daily cost of wages in added service, 49.41.

Mr. Richards: How much per hour?

A. 92.2¢.

Q. And the other figure you gave was the daily wage?

A. I gave the amount of the daily wages, and the amount per hour of the daily wages.

Q. Well, state the daily wage again, because I think in the record it does not check with the word daily wage. What was the daily wage?

A. The daily wages paid on account of the added service, 49.41. Now, in regard to getting at the remaining costs, I would have to correct a memorandum I made to correspond with the agreed variable costs we arrived at last night.

Q. The figure you had before?

A. I used a figure somewhat in excess—No, it is not very far different. I used a figure applying to that particular service, while the figure we arrived at last night was a figure that would apply to any extra, the average extra service.

Q. Do you think this particular service would be more or less than average?

A. Less, somewhat.

Q. The figure you reached last night was —?

A. 16.65¢.

Q. Which would be somewhat more than the service on West Third?

[fol. 879] A. Yes, the figure I used for West Third Street line was 15.45, as the total cost. In arriving at that figure I took the actual cost of the wages.

Q. Give us the figure you first arrived at, because the

other one can be computed from the agreed figure of last evening.

A. At 15.45¢, which is the figure I used, I got a daily cost of 79.64. Now if that were computed at 16.65, it would increase it 1.2¢ on the 515 miles, 5.15; but the figure we arrived at last night I don't think applied to this service. I think, in view of our work last night, my figure of 15.45 was too high for this service.

Q. The amount of added revenue which you say is the minimum, you think actually there has been more than that received by reason of the added service?

A. Very much. I think that if those ten minute spaces there in the non-rush hours had been left unfilled, there would have been any number more of jitneys than there are and we would have lost more.

Q. And you are still of the opinion that this service has more than paid for itself?

A. Yes I am, very much more.

Q. And before this added service was put on you consulted with Mr. Mitchell as to the legal effect?

A. I did.

Q. And did you receive advice, that he thought it was your duty to go ahead and put this service on?

A. I did.

Q. And in your judgment did you feel that it was required?

A. I did.

Q. And you acted on Mr. Mitchell's advice and your own judgment, and put it into effect?

A. I did.

Q. And you are still of the opinion that putting it into effect was best?

A. I am, and I am of the opinion that keeping it in effect is keeping our revenue up more than it is increasing our expense, considerably.

Q. And that is the only line in the city where there has [fol. 880] been any added service of any kind to compete at all with jitneys?

A. Yes.

Q. Or where jitney competition was any factor entering into the service at all?

A. Yes.

Mr. Mitchell: And that is the only place where there has been any extra service put on and continued regularly?

A. Yes, all other changes in car milage resulted from a trip or two here and there temporarily.

Examined by Mr. Carman:

Q. Your contention with reference to this added service on the West Third Street line might be summed up in this statement, might it not: that you believe that you saved enough passengers away from the jitneys to pay the cost of added service?

A. Yes, and more than that.

Q. That is what your estimate here, that you have been talking of, is based upon—that theory?

A. Yes. In my estimates I have computed only the added revenue that seems clearly and definitely to result from that change, without attempting to estimate how much more there might have been.

Q. And that was the real motive in putting on the added service, was to compete with jitney competition?

A. The motive in putting on the added service, as I have repeatedly said, was this: before that service was put on we had noted from our quarterly service, made from daily reports of conductors, that on that section of our lines we had, prior to the jitneys going in there, many more passengers per trip than we had on any other section in the city. In other words there was more traffic for the service given, the service was less proportionate to the traffic than any other in the city and we felt an injustice in that section, that they were entitled to more frequent service.

[fol. 881] Q. In other words before the new service was put on it was perhaps the most profitable line?

A. It was—not the most profitable line, I won't say, but it was the line on which the greatest number of passengers were carried per car. I would have to take into consideration the length of the haul to figure profit.

Q. You have estimated that you retrieved from jitney competition about 1,260 revenue passengers per day by this added service?

A. Yes, at least that many.

Q. And in spite of all that you saved you still lose at least 2,600 per day to jitney competition all over the city. I believe that was your previous testimony?

A. If I so testified that would be my best estimate, at the time; that seems about what I now think would be the number carried.

Q. And it is also a fact that before the six cent fare went into effect that you estimated your total loss to jitney competition somewhere near 600 revenue passengers per day?

A. I don't believe that is true. I think I stated that at the time the six cent fare went into effect, which was August 1, 1922, the new paving on Superior Street was just completed, I think the day before. During the time the street was torn up then jitneys were running on First Street, and we were not keeping observation of the number of passengers carried. There were jitneys running and carrying passengers; how many we don't know. Upon the completion of the new pavement which was the day the fare was increased, we resumed running on Superior street.

Q. You did state in your previous testimony, did you not, that you estimated that 18,000 for the month of April, 1922, which was just before the tearing up of Superior Street commenced——

[fol. 882] A. I may have so estimated at that time. If I did, I think it was with the explanation and reservation that we had no record during the months when Superior Street was torn up.

Q. Now this Pulaski-Spencer audit that you were asking about, in which you stated it saved $70,000 income tax, you don't mean that you have to have the Pulaski-Spencer audit every year as a normal expense, do you?

A. I don't know that we will have to have a Pulaski-Spencer audit every year.

Q. I mean to figure income tax.

A. I hope we won't. We may have something else to take its place.

Q. It simply boils down to this, that you made returns that showed—led the government to claim $70,000 more than it had coming to it, and then you had this audit to show the facts of the $70,000?

A. I merely mean to show that by that audit we saved over $70,000 in taxes.

Q. That is, that you showed the government that its claim on your return was $70,000 too high?

A. Yes.

Q. You have stated that in your judgment the accrued depreciation in your company is a fair representation of the actual depreciation, did you not?

A. Yes, if on a fair valuation.

Q. And that the revenue officials indicated that it was rather too low?

A. Yes, the revenue officials indicated that we had not set up enough depreciation.

Q. Then that means that the Commission, in arriving at the per cent condition of your property as 83% was wrong by almost 3%, and on that accrued depreciation the condition would have been 80% plus?

A. It depends altogether on what you base the percentage, what valuation it is on.

Q. In other words, the accrued depreciation is nearly 20%. The Commission had 17.

[fol. 883] Mr. Carmichael: Well Mr. Warren has not been put on the stand to testify concerning the fact as to what he understands the property of this company has been depreciated.

Mr. Carman: We understood that he was.

Mr. Carmichael: No. He is testifying as to what the books show. Mr. Drum, Mr. Gifford and Mr. McWethy have testified as to the amount of actual depreciation in the property. Mr. Warren has never been examined as to that.

Q. Now, you have also been asked about several items, picked out at random in your expenditures for 1922 in which you say that the actual expense is greater than the Commission's estimate. When this matter was before the Commission you made an estimate and testified to the Commission that it was your best judgment that the operating expenses for the year 1922 would be $1,224,897.

A. That was my estimate of the operating expense, depreciation and taxes.

Q. And taxes?

A. Yes.

Q. Now your actual expenses as claimed by you in your report to the Commission for 1922, including taxes—in other words, the actual expenses upon the estimate that you admit was $1,146,799.28 of course both of those estimates included all taxes, I mean both of these statements.

Mr. Carmichael: It is all right except the cents.

A. It was $1,146,799.04.

Q. And that shows that your estimate for all of the operating expenses, taken as a whole, covering all items including taxes was 6.81% too high on the actual paid out amount before any adjustments to normalize the same had been made to the Commission.

A. The percentage might be something like that. I have not computed it.

[fol. 884] Q. On these items which you have testified were underestimated by the Commission is the snow and ice which you have taken for a seven year period, to show that the cost of removing snow and ice for that seven year period was about $2,000 above the estimate allowed by the Commission—$7,000 instead of $5,000. That seven year period you have taken back into the war period, covered by the war period, and all the costs of labor were at the peak, the highest they have ever been?

A. Yes.

Q. Referring to Plaintiff's Exhibit 39, your estimate in column 2 of revenue, which you estimate would have been derived from the five cent fare in 1922, is based upon the number of passengers at six cent fare where you state that the actual——

A. It is based on the actual number of passengers carried and 6¢ fare in effect after August 1st.

Q. And also in this Exhibit 39, the first column of figures which you have headed 1922, being income as estimated by Mr. McWethy at the 5¢ rate, was the adjusted figure by Mr. McWethy?

A. They are the figures which gave the result in operating income used by the Commission in its order, making $254,107.26.

Q. And the figures in the second column, 1922, actual, as to expenses and taxes, but at a 5¢ fare, are not only based upon the passengers carried at 6¢ fare, but they are based upon the cost claimed to the operating expense, without any adjustments being made by the Commission?

A. They are based upon the statement of operating expenses.

Q. That has nothing—that is, nothing has been done to normalize or to make these figures normal as to any item contained in this second column here?

(No answer.)

Mr. Carmichael: We do not admit for a minute that there is a single thing in that that is not normal.

Testimony closed.

[fol. 885] [File endorsement omitted.]

[fol. 886] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT OF SPECIAL MASTER—Filed December 10, 1923

To the Honorable the District Court of the United States for the District of Minnesota, Third Division:

This action, to restrain enforcement of an order of the Railroad and Warehouse Commission establishing rates to be charged by the plaintiff for the carriage of passengers in the City of Duluth, Minnesota, came on to be heard before the undersigned, as Special Master, August 13, 1923, and thereafter from time to time hearings were had at Duluth and St. Paul, the case being finally submitted November 10, 1923.

[fol. 887] Messrs. Washburn, Bailey & Mitchell appeared for the plaintiff, Mr. Ernest C. Carman, and later Mr. Ivan Bowen, appeared on behalf of the defendants; Mr. John B. Richards appeared for the intervener, the City of Duluth.

Mrs. Jessie Carey Smith was appointed as stenographer and reporter and took and reported the evidence which is filed herewith.

Having considered the evidence produced and the arguments advanced by the respective parties, I find and respectfully report as follows:

I

The plaintiff, a duly incorporated street railway company, for many years prior to 1921 operated connecting street railway systems in the cities of Duluth, Minnesota, and Superior, Wisconsin, holding in Duluth the franchises described in the complaint. Defendant Clifford L. Hilton

is the Attorney General, and the defendants O. P. B. Jacobson, Ivan Bowen and Frank W. Matson are the members of the Railroad and Warehouse Commission of Minnesota. The intervener, the City of Duluth, is a municipal corporation.

[fol. 888] II

On April 14th, 1921, there was duly approved Chapter 278, General Laws of Minnesota, 1921, and shortly thereafter the plaintiff elected to comply with and come under the terms and provisions of that statute as to its railway in Duluth, by filing the declaration and consent set forth in the complaint, and thereupon obtained an indeterminate permit to operate and conduct its street railways in the City of Duluth subject to the terms and conditions and with the duties, rights and privileges set forth, granted and declared by said Chapter 278, Laws 1921. At the date of the enactment of Chapter 278, Laws 1921, and at the time of said election the rate of fare existing in Duluth was 5¢ per passenger.

III

Thereafter, the plaintiff duly applied to said Railway and Warehouse Commission, pursuant to the provisions of said Chapter 278, Laws 1921, that the Commission determine the value of the property of the plaintiff devoted to said street car service in Duluth and the rates and fares to be charged by plaintiff.

[fol. 889] IV

Due notice of said application was given to all persons interested, the City of Duluth was made a party to the proceeding, a full hearing was given by the Commission and testimony received, and after due hearing and consideration the Railroad and Warehouse Commission on July 13, 1922 made and filed its determination and order, to be effective August 1, 1922, wherein it was found and determined that the value of plaintiff's property used and useful in said street car service in Duluth on December 31, 1921 was $4,599,978.22, upon which amount the plaintiff was entitled to an annual net return of 7½%, and to enable the plaintiff to secure the same it was "authorized to charge for its

service in the transportation of passengers within the City of Duluth six (6) cents cash fare," and should "issue tickets or tokens good for rides on its said lines within the City of Duluth and charge therefor not to exceed twenty-five (25) cents for five (5) rides."

V

The fair value on December 31, 1921 of plaintiff's property used and useful in the street car service in the City of Duluth was $4,599,978.22, and the plaintiff was, at the date of the Commission's order, and now is, entitled to rates of fare which would, after paying operating expenses and Federal and State taxes yield a net annual return to plaintiff [fol. 890] upon that value of 7½%, or $345,000.

VI

Between December 31, 1921 and July 31, 1923, plaintiff has added to said system in Duluth, property of the value of $189,953, which is not included in the value above found, nor is that additional property taken into consideration hereafter in these findings.

VII

The total number of passengers carried by plaintiff during the year ending July 31, 1923 was 25,384,100, and had the rates ordered by the Commission been in effect, the number of passengers carried would not have exceeded 26,114,100, from whom the plaintiff, under the rates ordered by the Commission, would have received no more than 5⅓¢. per passenger, or an aggregate of $1,393,831.52, but from the fares actually charged and collected during said year, namely 6c. per passenger, the plaintiff received as a gross operating revenue $1,523,046.00
Non-operating and other revenue 15,202.62

Total Revenue $1,538,248.62

[fol. 891] VIII

The plaintiff's ordinary and necessary operating expenses per annum are	$1,078,671 42
To which must be added taxes, State and Federal	112,352 97
Making a total of	1,191,024 39
And 7½% return on $4,599,978.22; the value of the property, amounts to	345,000 00
Making a total amount to which it is entitled to earn from its public service	1,536,024 39
Upon this amount should be credited non-operating and other revenue	15,202 62
Leaving to be earned annually by fares charged to its passengers upon its street cars	$1,520,821 77

IX

As a conclusion it is found that under the rates and charges established by the Railroad and Warehouse Commission of Minnesota, in and by its order of July 13, 1922, the plaintiff could not and will not earn sufficient to meet its operating expenses and taxes and receive a net return of 7½% upon the fair value of its property as it was on December 31, 1921 and that the enforcement of said order would, therefore, deprive plaintiff of its property without just compensation; that to earn such return the plaintiff [fol. 892] must be permitted to charge and collect 6¢ for each passenger carried by it in the City of Duluth.

[fol. 893] These findings have been arrived at in the manner, for the reasons and upon the computations herein stated, as follows:

The Commission, having found the fair value of the property as of December 31, 1921, also found the plaintiff to be entitled to an annual return at the rate of 7½% upon that value, which would be $345,000, and found further that plaintiff should be permitted to include in its operating expense on account of depreciation the sum of $115,000, which was 2½% upon $4,600,000, which the Commission found

was the reproduction cost, new, undepreciated, of the physical property. In computing plaintiff's taxes, the Commission did not include any amount for Federal income tax.

The Commission next determined the amount of ordinary, or what has been called normal, operating expense, which, including depreciation and state taxes, it found would be $1,111,726.84. The Commission also estimated that at least 27,030,000 passengers would be carried each year and concluded that 6¢ cash fares and five tickets for 25 cents would, with the other revenue of the Company, produce a net return upon the value found of 7½%. While it is not so stated in the order, it appears from the evidence in this case the Commission believed that not more than two-thirds of the passengers would avail themselves of the right to purchase tickets. Neither does the order specific- [fol. 894] ally state the amount of the revenue which the Company would receive in addition to operating revenue, but by taking the estimated number of passengers, 27,030,000, at 5¢, $1,351,500, and deducting that from the total gross revenue of $1,365,834.10, which the Commission found the Company would receive under the then existing rates, we find this additional revenue amounted to $14,334.10.

The findings of the Commission as to existing conditions December 31, 1921 may, therefore, be summarized as follows:

Fair net return		$345,000 00
Operating revenue, 27,030,000 passengers @ 5¢	$1,351,500 00	
Other and non-operating revenue	14,334 10	
Total income	1,365,334 10	
Gross expenses except federal tax	1,111,726 84	
		254,107 26
Deficit		90,892 74

The Commission stated that its conclusions necessitated an increase in rate of fare which would produce approximately $95,000 and this amount it felt could be secured by increasing the rates as above explained. The result the Commission anticipated was:

[fol. 895] 27,030,000 passengers @ 5⅓¢	$1,441,600 00
Other revenue	14,334 10
	1,455,934 10
Expense	1,111,726 84
Return	334,207 26

It necessarily appears from what has been said that the sufficiency of the new rates to afford this return depended upon the correctness of two assumptions: first, that the passengers carried annually would be 27,030,000 and second, that not more than two-thirds of those passengers would avail themselves of the privilege of paying only 5¢ by the purchase of tickets.

Finding One is self-explanatory.

Findings Two and Three

Prior to the enactment of Chapter 278, Laws of Minnesota, 1921, that act being approved April 14, 1921, the plaintiff operated its street railway system in Duluth under the franchise set up in the complaint, the fare charged being 5¢ per passenger. It was claimed by the defendants upon the trial that these franchises would expire in the comparatively near future but that while in force a contract existed between the Company and the municipality under which not more than 5¢ per passenger could be collected. [fol. 896] Very shortly after the enactment of Chapter 278, the plaintiff took the necessary steps to accept that act and come under its provisions. By so doing it obtained an indeterminate franchise to conduct its business in the City of Duluth, as well as the right to have its charges fixed under the terms of the act and, of course, became subject to all of the other conditions of the act.

The defendants insist that this action cannot be maintained since, as they claim, the election to accept the terms of the legislative act created a contract under which the right of appeal to the state court, given by the act, is exclusive.

This claim was presented to the United States District Court and it was only after the motion to dismiss was denied that the Master was appointed.

The question of law presented by this claim does not seem to be within the scope of the matters referred to the Master for consideration. The facts, however, are found so that the parties will, upon the coming in of this report, have a full opportunity to present to the Court their respective claims upon this question.

Finding Four is self explanatory.

[fol. 897] Finding Five—Value and Return

To determine the fair value as of December 31, 1921 as a basis for rates, there was first taken into consideration the presumption in favor of the Commission's findings tested by considering as far as possible the elements of value enumerated in

Smyth vs. Ames, 169 U. S. 467.

The Commission first found the value as of July 1, 1921, which it itemized as follows:

Physical property undepreciated (excluding land)		$3,940,000.00
General overheads		550,000.00
Power contract		110,000.00
		4,600,000.00
Depreciated value	$3,818,000 00	
Lands	140,000.00	
Working capital, materials and supplies	135,000.00	
Going concern	500,000.00	
	4,593,000.00	
It then added to this for additions to December 31, 1921	6,978 22	
Total December 31, 1921	$4,599,978 22	

On the hearing before the Commission and here the engineers of the respective parties agreed upon an inventory of the physical properties, also, except land, the cost of reproducing those properties, upon four different bases,

but reached no agreement as to the value of the land, the power contract, expenditures not apparent in the inventory, engineering and superintendence, administration, organiza- [fol. 898] tion and legal expenses, taxes during construction, interest during construction, working capital, cost of financing, development cost or going value.

These agreed bases were:

1. Pre-war prices current 1915	$3,488,161 00
2. Average ten years, 1911-1921	4,864,437 00
3. Current prices June, 1921	6,308,966 00
4. Original or investment cost	3,487,020 00

Neither was the amount of materials and supplies disputed. This amount was $105,000.

Cost of Reproduction

The reproduction method is useful in ascertaining present value of the property when reasonably applied.

Minnesota rate cases, 230 U. S. 352.

The method, being based upon assumptions, is capable of being expanded almost without limit and if one were to adopt the formula prepared by some advocates of the method he would arrive at a cost so extreme as to be worthless in finding true value, which is the ultimate fact sought.

In City of Winona vs. Wisconsin-Minnesota Light & Power Co. 276 Fed. 996, Judge Booth said:

"I do not exactly so understand the decisions of the Supreme Court; but, on the contrary, that all relevant facts are to be considered in reaching a judgment of what is reasonable present value, and cost of reproduction new whether at the present time or at some other time, is but one of the relevant facts to be considered. * * *"

[fol. 899] In using cost of reproduction as a test of the value found by the Commission it was necessary to generally disregard the findings as to specific items found in the Commission's report and build up independently the total arrived at by this method.

Inventory (Except Land and Materials and Supplies)

There was first taken investment or physical cost of the inventoried properties, Basis 4, $3,487,020.00. To this was added $6,385.00 for expenditures not apparent in the inventory, giving $3,493,405. This amount was increased by 40% to allow for increased prices prevailing in 1921, giving a total of $4,890,767.

The evidence as to depreciation varied from approximately 14% to 19%. The Commission found depreciation of 17%, which seems fair and reasonable and the above amount is, therefore, depreciated by 17%, or $831,430.39, which, being deducted, leaves $4,059,336.61.

Land

Under land was included not only the actual land owned but the right of the plaintiff to maintain an incline structure on Seventh Avenue, Duluth, which practically occupies the entire street. As to the land, witnesses for the plaintiff gave the value as $103,900. Witnesses for the defendants valued the land at approximately $88,000, which [fol. 900] was its assessed value, and also claimed that the amount of $7,180 should be deducted as the amount which represented the use made of the land by the Superior portion of the entire system. The value of plaintiff's witnesses, $103,900 was taken and from this there was deducted $7,180, leaving the value of the land proper, $96,720.

Seventh Avenue extends up the face of a steep hill and upon this the plaintiff maintains a heavily constructed railway upon which, by means of cables, cars are brought to and from the summit of the hill. The railway structure occupies the entire street except foot paths upon each side and at street intersections where the railway spans the intersecting street. The right to so occupy Seventh Avenue was granted without any payment to the city, but it appears from the evidence that payments aggregating $31,754.00 were made to abutting property owners as compensation for the additional servitude to which the street was subjected by reason of the structure. Plaintiff claimed the value of its privileges in Seventh Avenue to be $46,000.

It would seem, however, to be in the nature of a franchise or privilege which actually cost the amount stated and has,

therefore, been included in the item of land at cost, $31,754.00, making the total value of land, $128,474.00.

[fol. 901] Overheads

The term overheads has been used to cover engineering and superintendence, administration, organization and legal expenses, taxes during construction and interest during construction, which were estimated by Mr. Drum, plaintiff's engineer, at $759,642.00; and by Mr. Gifford, the engineer for the City, at $369,534.00.

It was claimed by the plaintiff and the estimates of its witnesses were prepared upon the theory that this item of overhead increased in the same ratio as did the prices of the physical properties.

In so far as overheads are an estimate of expenses actually incurred at the time of the original construction, they may properly be included, but when the original amounts of such items are increased as above stated and added to the enhanced value of the property because of a purely imaginary reconstruction, the assumption, false in itself, is used to enhance value, necessarily leading to a false result.

The overheads originally incurred and as estimated by Mr. Gifford, were taken, amounting to $369,534.00.

Cost of Financing

What has been said with reference to overheads applies equally to cost of financing. There is to be no refinancing of the property at this time, but it appeared from the evi- [fol. 902] dence that the original financing cost was $89,075 and that amount has been included.

City of Winona vs. Wisconsin-Minnesota Light & Power Co., supra.

Materials, Supplies and Working Capital

Both parties seem satisfied with the estimate of $105,000 for materials and supplies. As to working capital, however, there was a sharp conflict, the plaintiff claiming that the average balance maintained for this purpose was approximately $87,000. This, however, included accumula-

tions for interest, taxes and dividends and the amount allowed by the Commission as working capital, $30,000 should be ample. These items, therefore, were included at $135,000.

Going Value

This is an added value which results from the completion, adjustment and immediate availability of the plant for the purpose for which it is intended. It is intangible and difficult of segregation from the physical property. If, in ascertaining reproduction cost, the amount of the items called "overhead" are increased because the price of the items of the inventory have increased, every element making up going value is included, since all expenditures caused by the assembling, adjusting and adapting of the property for the intended purpose are included. If going value [fol. 903] should ever be added to reproduction cost it should only be where, as in the above computation, the amount of the overheads estimated to have been originally incurred is taken as constant. 10% of the original cost of the inventoried physical properties, except land and materials has been taken for this item, amounting to $350,000.

Power Contract

The Commission allowed $110,000 on account of power contract, which is not included in the above amount.

When electricity was first applied as a motive power to the street railways in Duluth, the Company generated the electricity required in its own power house. Subsequently it was able to secure a contract with an electric power company under which the cost of electricity was so much less that the power plant was eventually scrapped. The contract thus obtained is a favorable one and will expire in 1931.

While this contract might be taken into consideration upon a sale of the property or a valuation for that purpose, it should not be considered in ascertaining the proper basis for rates, as it belongs to the class of provident economical contracts which it is the duty of the Company to make whenever possible so as to furnish economical service to the public.

Bringing together all of these items, the cost of reproduction as above found is as follows:

[fol. 904] Inventory, except land and materials		$3,487,020 00
Expenditures not apparent in inventory		6,385 00
Inventory		3,493,405 00
Add 40%		1,397,362 00
		4,890,767 00
Depreciation, 17%		831,430 39
Inventory, depreciated		4,059,336 61
Property acquired between July 1 and December 31, 1921		6,978 00
		4,066,314 61
Land		128,474 00
		4,194,788 61
Overheads	$369,641 00	
Cost of financing	89,075 00	
Materials, supplies	105,000 00	
Working capital	30,000 00	
Going value	350,000 00	
		943,716 00
Total reproduction cost		$5,138,504 61

Original Cost

While this cannot be determined with absolute accuracy it may, for the purpose of comparison, be estimated as follows:

Inventory, except land and materials and supplies, Basis 4		$3,487,020.00
Items not in inventory		6,385.00
Added between July 1 and December 31, 1921		6,978.00
		3,500,383.00
Land (present value)		128,474.00
		3,628,857.00
Overheads, estimated	$369,641.00	
Financing	89,075.00	
Material and supplies	105,000.00	
Working capital	30,000.00	
		593,716.00
		$4,222,573.00

[fol. 905] The foregoing computation adds nothing for increased prices, deducts nothing on account of depreciation and, of course, includes nothing for going value. It is, however, proper to call attention to the fact, which may be considered with reference both to reproduction cost and original cost, that something more than $500,000 of the amount shown as investment cost, or Basis 4, was expended during the period of extremely high prices in the years immediately following the war.

Value for Taxation

The assessed value of the property as of May 1, 1921, which was supported by the evidence of Mr. Scott, an experienced appraiser and assessor of the City of Duluth, and which was established after a contest upon the part

of the plaintiff upon the claim that it was excessive, was the following:

Personal property	$3,199,486 00
Land	88,240 00
Buildings	156,890 00
	3,444,616 00
Deduct portion attributable to Superior system	7,180 00
Total	3,437,436 00

The above item of personal property, of course, includes only the personal property used and useful in the street railway system.

[fol. 906] Capitalization

The following table shows the outstanding bonds, how proportioned between Duluth and Superior and their market value.

	System	Duluth	Superior	Market value
1st Mortgage	$2,500,000	$1,816,000	$684,000	92%
Gen. Mortgage	969,000	703,882	265,118	82%
	$3,469,000	2,519,882	1,129,118	

Stock

System	Duluth	Superior
$1,800,000	$1,200,000	$600,000

Total Capitalization

Bonds, interest 5%	$2,519,882 00
Stock	1,200,000 00
	3,719,882 00

The bonds and stocks are apportioned above upon the testimony of the witnesses for the plaintiff, although it was not shown why the bonds should not be apportioned in the same ratio as the stock. The market value of the stock

was not shown. It did appear, however, that all of the stock is held by the Duluth-Superior Traction Company, having stock of par value of $5,000,000 divided between $3,500,000 common and $1,500,000 4% preferred. It also ap-
[fol. 907] pears that part of the stock of the Duluth-Superior Traction Company is held by the public.

This statement with reference to the stock of the Duluth-Superior Traction Company is made at the request of the plaintiff, but has not been taken into consideration in any of the computations made in this report.

Counsel for the city insisted that the balance upon the books of the Company charged to depreciation, approximately $704,000 should be deducted from any value which might be found, upon the claim that unless that were done a duplication to that extent would result.

If value were based upon the capital account and it appeared that the amounts charged to depreciation were not deducted, counsel's contention would be correct, but since the valuation, with the exception of overheads, is based upon property actually in existence and used and useful in the public service, this claim has been disallowed.

The various amounts thus considered were:

Reproduction cost	$5,138,504 61
Original cost	4,222,573 00
Taxable value	3,437,436 00
Stocks and bonds	3,719,882 00
Value as found by Commission	4,599,978 22

[fol. 908] and the actual value as a rate base as of December 31, 1921 was determined to be the amount found by the Commission, $4,599,978.22, segregated as follows:

Inventory, including all original cost (except land, material, supplies and working capital)	$3,986,504 22
Going value	350,000 00
	4,336,504 22
Land	128,474 00
Materials and supplies	105,000 00
Working capital	30,000 00
	$4,599,978 22

Rate of Return

The Railroad and Warehouse Commission of the State of Minnesota is an administrative board having, under the laws of Minnesota, power to regulate the rates of public service corporations subject to its jurisdiction and, as a necessary incident, to determine the return which the corporation is entitled to earn as one of the bases for the establishment of just and reasonable rates.

This power, in the absence of legislative action is exclusive and when exercised within constitutional limitations is absolute.

I. C. C. vs. Cincinnati, etc., 167 U. S. 479.
Minneapolis vs. Rand, 285 Fed. 818.

[fol. 909] The return must not be so inadequate as to result in confiscation, nor can it be so large as to be arbitrary and extortionate. But between those extremes—confiscation and extortion—there is a wide field in which the finding and judgment of the Commission is decisive.

Minneapolis vs. Rand, 285 Fed. 818.

The finding by the Commission that the rate of return, after allowing for depreciation, should be 7½% upon the value of the property as of the date taken, December 31, 1921, comes within the limits indicated and must be accepted as final in this action. In addition it is found to be at least sufficient and not to be changed at the suit of the plaintiff.

Finding Six is self explanatory.

Finding Seven—Revenue

The Commission estimated the plaintiff would carry annually 27,030,000 passengers and while not stated in the order, the evidence showed the Commission also estimated that two-thirds of such passengers would avail themselves of the privilege of buying five tickets for 25 cents, which would result in an average rate per passenger of 5-1/3¢. Had these expectaions been fulfilled, it is entirely possible the rates would have been found adequate, but during the twelve month period ending July 31, 1923, the plaintiff actually transported only 25,384,100 passengers, who, at 5⅓¢. each, would have paid $1,353,818.66, to which, if there

[fol. 910] be added $15,202.62 for other revenue, there would be a total revenue of $1,369,021.28, instead of $1,460,834.10, which the Commission estimated as necessary to give a return of 7½% upon the valuation found by it.

It is insisted that the interlocutory injunction issued in this case resulted in a large decrease in the number of passengers using the street cars and it is conceded by the plaintiff that the number of persons daily riding upon the jitneys in the City of Duluth after the injunction increased from 600 per day to 2,600 per day. Defendants claim this entire number should, for the purpose of making a fair test, be added to the number of passengers actually carried.

Whatever may be said as to the increased number using jitneys after the injunction, it certainly does not apply to the 600 per day prior to the injunction, for up to that time street car fares were 5¢. If, therefore, 2,000 passengers per day, or 730,000 for the twelve month period be added to those actually carried, giving a total of 26,114,100, and if only two-thirds would use tickets, the result would be as follows:

Operating Revenue	$1,392,752 00
Other revenue	15,202 62
Total	1,407,954 62

which is still $52,879.48 less than the amount the Commission found necessary.

[fol. 911] The revenues which would be derived upon the different bases are summarized as follows:

25,384,100 passengers at 5-1/3¢	$1,353,818 66
Other revenue	15,202 62
Total revenue	$1,369,021 28
26,114,100 passengers at 5-1/3¢	$1,392,752 00
Other revenue	15,202 62
Total revenue	1,407,954 62
25,384,100 passengers at 6¢	$1,523,046 00
Other revenue	15,202 62
Total revenue	1,538,248 62

There is, however, no certainty that under the fares prescribed by the Commission the daily loss of 2,000 passengers would be restored. Under those rates single cash fares would be 6¢ and it is a mere matter of conjecture how many of the persons using the jitney service would be those who would otherwise pay the cash fare.

Neither is it certain that no more than two-thirds of street car passengers would purchase tickets, evidence was introduced by the plaintiff for the purpose of showing that more than 90% of the passengers would purchase tickets. This estimate is probably excessive, but in the absence of a practical and fair test, any estimate must be more or less conjectural; the tests, however, were sufficient to demonstrate that the Commission's estimates were erroneous and distinguishes the showing here from that made in Georgia [fol. 912] R. & P. Co. vs. R. R. Com. 43 S. C. R. 680.

The plaintiff criticized the authorities of the City of Duluth for failing to prevent the expansion of the jitney service. Transportation by jitneys is a lawful occupation and while a reasonable tax would be entirely legitimate, it is difficult to see what justification there would be for a tax so large as to be prohibitive.

Finding Seven—Operating Expenses and Taxes

The year ending July 31, 1923 was taken as the period upon which to compute operating expenses, taxes and revenue.

The defendants and the intervener insisted that the period so taken did not furnish a proper test for the reason that the Commission's rates, never having been put in operation, no sufficient test had or could be made as to their effect.

In some respects this contention is true, but there is no reason why that period should not be taken for the purpose of determining expenses of operation and it furnished the only period of continuous twelve months since the issuance of the interlocutory injunction in this case.

The plaintiff claimed (Exhibit 38) its operating expenses, exclusive of taxes, for the period were, $1,117,475.25. Some deductions should be made from this amount:

[fol. 913] a. During the last eight months of the year ending July 31, 1923 the plaintiff, without asking or receiving authority from the city, increased the number of cars upon one or more of its lines, increasing the car miles operated by approximately 253,207, and at an increased operating expense of approximately $42,158.69. No evidence was produced to indicate that this additional expense was not incurred in good faith, nor was there any definite showing as to what effect it had upon the revenues of the Company, although Mr. Warren, the General Manager of the Company, testified that he believed the service paid for itself.

The definite schedule approved by the City Council should be construed as the minimum service required and in the absence of a strong showing either that the additional service was wholly unnecessary and ill advised, or that it was not furnished in good faith, the expense of such service should not be deducted from operating expenses and the claim for such reduction is disallowed.

b. The Company charged, during the period, for depreciation, $137,586.30.

The Commission found 2½% upon depreciable property a reasonable allowance and computing this upon the physical property, excluding land, undepreciated, and including general overheads, power contract, a total of $4,600,000, allowed depreciation at $115,000. If an allowance for depreciation is intended to restore investment, the Commis- [fol. 914] sion computed depreciation upon an excessive amount, but in any event, $115,000 is sufficient and that amount deducted from $137,586.30 results in a net deduction from operating expenses on account of this item of $22,586.30.

c. In legal expense is included attorneys' fees for this litigation in the sum of $15,000. This amount, if allowed at all, should be amortized over five years and there results therefrom a deduction of $12,000 on account of this item.

City of Winona vs. Wisconsin, Minnesota Light & Power Co., supra.

d. An employe of the plaintiff converted certain securities and money belonging to it and $4,217.53 is charged on account of that loss and that amount must be eliminated.

e. The charges made for expenditures on "bridges, trestles and culverts" was claimed to be excessive to the extent of $2,203.92.

f. The Company's claim for expenditures in removing ice and snow was claimed to be excessive to the extent of $4,341.09.

No deduction is made because of the last two items. It is not claimed that the amounts were not actually expended and to reduce them because of comparison with other years or an average of other years seems too conjectural. The result, therefore, is as follows:

[fol. 915] Claimed operating expense (Exhibit 38)		$1,117,475 25
Deductions:		
Depreciation	$22,586 30	
Attorneys' fees this litigation amortized five years	12,000 00	
Jaeger defalcation	4,217 53	
		38,803 83
Operating Expense allowed		$1,078,671 42

Taxes

State Taxes	$82,202 77
Deduct for property in Duluth apportioned to Superior division	851 48
	81,351 29

The Commission allowed no deduction for Federal income taxes, but since the order was made the Supreme Court of the United States has held such taxes must be deducted.

Georgia Ry. & Power Co. vs. R. R. Com. 43 S. C. R. 680.

The Federal tax is 12½% upon net revenue after deducting interest upon bonds and state taxes. By reference to the next subdivision of this report it will be seen

that the total annual revenue (6¢ fare) was	$1,538,248.62
Operating Expense as found	1,078,671.42
	459,577.20
Jaeger defalcation	4,217.53
	455,359.67
State taxes	81,351.29
	374,008.38
5% interest on $2,519,882 of bonds apportioned to Duluth	125,994.10
	248,014.28
Upon which 12½% is	31,001.68

[fol. 916] This gives as total for operating expenses and taxes, state and federal, the following:

Operating Expense	$1,078,671.42
State taxes	81,351.29
Federal income tax	31,001.68
	$1,191,024.39

The defendants and the intervener strongly insist that the foregoing allowance for Federal income tax is excessive. Whether that is true or not depends upon the allowance made by the government for depreciation and operating expense. It would not be proper to assume that those allowances would be greater than as they appear in this report and for the purpose of this report the tax must be computed according to the facts as found; further, the ultimate finding as to the necessity for a 6¢ fare would not be changed by a smaller estimate of the Federal tax.

Adequacy of Return

The actual result of the operation of the system for twelve months ending July 31, 1923 was as follows:

25,384,100 passengers at 6¢		$1,523,046.00
Other revenue		15,202.62
Total Revenue		1,538,248.62
Operating Expense	$1,078,671.42	
Taxes State & Federal	112,352.97	
		1,191,024.39
Net return		$347,224.23

[fol. 917] Seven and one-half per cent upon the value $4,599,978.22, as found by the Commission and in this report, would be $344,998.36. The difference between that sum and the amount received is negligible.

Such return is fully adequate. Interest upon the outstanding bonds amounts to $125,994.10, leaving $220,702.83 to the Company and if distributed to the stockholders would give a return upon par value greatly exceeding 7½%.

Duluth is a growing and progressive city and because of its topography street car travel is comparatively heavy. The return even when computed upon present value is higher than the legal rate of interest in Minnesota, higher than the rate generally found in bonds or mortgages and at least equal to the return obtained in enterprises of similar character.

It is also more than sufficient to meet the requirement of the trust deed read into the record, that net earnings should be double the interest payable upon all outstanding bonds.

It is a pleasure to report the uniform courtesy shown by all the counsel engaged upon this case, the exhaustive briefs presented and the able and vigorous manner in which was pressed each of the claims of the respective parties.

It is recommended that a decree in the form herewith [fol. 918] transmitted be entered, permanently enjoining the enforcement of the order of the Railroad and Warehouse Commission dated July 13, 1922, upon condition that

until the further action of the Commission, or the further order of this Court, the plaintiff charge and collect no more than 6¢ for each passenger carried in the City of Duluth.

A transcript of the testimony given upon the hearing and the exhibits introduced are filed with this report. It is recommended that the compensation of the reporter, Mrs. Jessie Carey Smith be fixed at $780.00. This amount includes per diem and transcript of the testimony furnished the Master, but nothing on account of final argument.

Dated St. Paul, December 10, 1923.

Respectfully, Thomas D. O'Brien, Special Master in Chancery.

[File endorsement omitted.]

[fol. 919] In United States District Court

[Title omitted]

Supplemental Report of the Master—Filed December 24, 1923

[fol. 920] The Exceptions filed by the respective parties to the Report filed December 10th, 1923, of the Master, in the above entitled action, came up for hearing at St. Paul, Minnesota, December 22nd, 1923, Messrs. Washburn, Bailey & Mitchell appearing on behalf of the plaintiff; Ernest C. Carman, Esquire, appearing on behalf of the defendants, and John B. Richards, Esquire, appearing on behalf of the Intervener.

The following clerical or typographical errors appearing in the Report should be corrected:

In Finding "IV" on page four, the year "1923," occurring twice in that Finding, should read "1922."

In the eighth line of Finding "VII," on page five, the amount stated as "$1,393,831.52" should read $1,392,752.00.

In the eleventh line of Finding "VIII," on page six, the word "venue" should read "revenue."

Beginning on the fourth line of page sixteen the words "by reference to the table above set forth" should be stricken out.

The word "value" should be substituted for the word "capital" in the third line on page twenty.

[fol. 921] The word "property" is improperly spelled in the sixteenth line on page sixteen.

The amount stated in the second line from the bottom on page twenty-eight should be $4,600,000.00 instead of $1,600,000.00.

In the third line on page thirty-three the year "1923" should read "1922."

Mr. Richards, on behalf of the Intervener, presented for consideration a resolution adopted by the City Council of Duluth on December 21st, 1923, with reference to the additional service furnished by the Company and described in the original Report. The resolution was not received in evidence, and was excluded from consideration, upon the ground that the testimony in the case was closed and the resolution itself is incompetent.

By the Sixth Exception filed by the Intervener it is claimed that the Master failed to find the facts with reference to the use of the depreciation fund, sufficiently to enable the claim of the Intervener with reference thereto to be passed upon by the Court. While, in the opinion of the Master, the original Finding is sufficient for the purpose claimed, the following statement is made in addition to that contained in the original Report, and should be inserted after the eleventh line on page twenty-two of the [fols. 922-926] original Report:

"There had been credited, in the depreciation account, at the end of 1921, as an operating expense, an aggregate of $1,279,046.87, from which there had been charged, for renewals and replacements, $575,020.62, leaving a credit in the account of $704,026.25. This amount the City claimed had been at least in part expended for betterments and additions and should, therefore, be deducted from the amount found as the value of the inventoried physical property.

"The total amount of the depreciation thus credited has been expended by the Company; and, assuming the sum of $704,026.25 to have been expended for betterments and additions, the claim that such amount should be deducted is

disallowed, for the reason that the value here found is based upon the physical property actually in existence and listed in the inventory."

Except as hereinbefore set forth, the Exceptions filed by the respective parties, are and each of such Exceptions, is overruled.

The Exceptions are transmitted and filed herewith.

Thomas D. O'Brien, Special Master in Chancery.

Dated at St. Paul, December 24th, 1923.

[File endorsement omitted.]

[fol. 927] In United States District Court

[Title omitted]

Exceptions to Master's Report by the City of Duluth, Intervenor—Filed December 24, 1923

Comes now the City of Duluth, intervenor defendant above named, and takes exception to the Master's Report and recommendations upon the evidence taken by him in the above entitled action and for its exceptions and cause of exceptions does aver and set forth the following:

I

Defendant excepts to Finding of Fact numbered V. This exception is taken upon the grounds and for the reasons that said Finding is not justified by the evidence in the record.

(a) It is the claim of the City that the fair value of the plaintiff's property used and useful in the street car service of the City of Duluth did not exceed the sum of $3,800,000 and the defendant invokes the judgment of the Court upon the evidence leading to such result claimed by the City.

(b) Further on the ground that an annual rate of return sufficient to escape any legitimate charge of confiscation upon any fair value of said property properly to be fixed would not exceed 6% per annum, because of the fact that

[fol. 928] the evidence bearing upon this issue demonstrates that such annual rate of return of 6% is "equal to that generally being made at the same time and in the same general part of the country in investments in other business undertakings which are attended by corresponding risks and uncertainties;" and would attract capital investment at said rate of return to the Duluth Street Railway Company.

(c) Because it necessarily follows that a finding that $345,000 net income is required in order to give a just and reasonable rate of fare, is not justified by the evidence in this case, but that a fair application of pertinent rules to the facts would lead to the conclusion that a return of at least $240,000 net income (above all proper operating expenses) would be sufficient to comply with the requirements of Chapter 278, Laws of Minnesota for the year 1921.

(d) On the ground that such return of approximately $240,000 net income in excess of all proper normal operating expenses and all proper deductions would not amount to a confiscation of the plaintiff's property or a violation of its Federal Constitutional rights.

II

Defendant excepts to the Finding of the Master numbered VI.

(1) On the ground as stated by the Master that it is immaterial and should not be taken into consideration on the findings;

(2) Because it related to items of additions to the property not taken into consideration or invested at the time of the order of the Commission here attacked;

(3) Because examination of the evidence would show that such property so added as betterments to the equipment, was furnished from the moneys in the reserve fund paid by the public as operating expenses and was not to the extent of a single dollar provided by the Duluth Street Railway Company as capital on the funds of the Company, but was invested, paid for as a duplication of capital furnished by the people in the rates they paid.

III

Defendant excepts to that portion of Finding numbered [fol. 929] VII, expressed in the language as follows:

"And had the rates ordered by the Commission been in effect, the number of passengers carried would not have exceeded 26,114,100, from whom the plaintiff, under the rates ordered by the Commission, would have received not more than 5-1/3 cents per passenger or an aggregate of $1,393,831.52."

This exception is taken upon the grounds and for the reasons:

(1) That the evidence in the record in the admitted absence of any trial of the rates and fares fixed by the order of Commission, is too remote, conjectural, speculative and uncertain to support or justify said finding by the learned Master so limiting the number of passengers carried during the year ending July 31, 1923, had the rates ordered by the Commission been in effect; and

(2) The evidence in the record, such as it is, clearly preponderates in support of a finding that the number of revenue passengers that would have been carried during said year, had said rates been in effect, would have been greatly in excess of the number estimated by the Commission in its said order, to-wit: 27,030,000, and would not have been less than 28,000,000 of revenue passengers.

V

Said defendant excepts to the finding of the Master numbered VIII upon the grounds and for the reasons following:

(1) That the evidence in the record does not justify a finding that the plaintiff's ordinary and necessary operating expenses per annum are $1,078,671.42 exclusive of taxes; but that a clear preponderance of the evidence shows that said operating expenses are much less than said amount and should not exceed the annual sum of $999,528.42, exclusive of taxes.

(2) The evidence in the record does not justify a finding that Federal Income taxes should be included in operating

expenses and a net annual return allowed exclusive of such Federal Income taxes; but on the contrary it clearly appears from the order of the Commission that the rate of return fixed by it and sustained by the Master was and is 7½% net [fol. 930] annually minus Federal Income taxes.

(3) All other figures in said finding of the Master numbered VIII are correspondingly in error except the amount of "non-operating and other revenue" stated to be $15,202.62.

(4) Upon the ground that from such statement of ordinary and necessary operating expenses as found by the Master should be deducted an additional sum from the amount allowed by the Master as annual depreciation reserve of the sum of at least $29,554.75 for the reason that the amount fixed by the Commission annual at $115,000 and called "sufficient" by the Master is excessive; for said sum is equivalent to 2½% upon a total of at least $1,182,190 representing what the Commission and the Master treats as value of land, material and supplies, working capital, overheads, going concern value, cost of financing and (by the Commission) Power Contract; whereas such item of depreciation should only apply to depreciable property.

(5) Because the Master should have deducted from the capital base and agreed inventory value the sum of $704,000 because said sum was shown by the evidence to have been taken from the depreciation reserve fund and expended in property shown in the inventory for exclusively additions to the property, new equipment and extensions, thus using moneys furnished by the people in rates as a means of adding to the capital base and a means of securing from the public returns to the stock holders in the future upon such sum, $704,000, such sum not being capital properly furnished by the Company, the amount of depreciation annual, to-wit: 2½% on such sum is $17,600. It is claimed by the City that the operating expenses should be reduced also by this sum.

(6) Because the further sum of $21,028 should have been deducted from the Master's conclusion as to operating expenses because the evidence clearly shows that such ex-

pense was made by the Company without authority of law and in violation of the resolution of the City Council passed August 1, 1921, acting under its sole authority conferred by [fol. 931] Section 4 of Chapter 278 Laws of 1921, to fix the standard of service to be furnished by the Street Railway Company; and because the evidence conclusively shows that the Company without authority of the City Council secretly changed the regular schedule and prescribed standard of service which was a maximum standard so far as regular schedules were concerned and changed a ten-minute service on the West Third Street line to a 5-minute service operating eight (8) hours each day at the said cost conclusively shown and admitted in the record to be the cost. Because the Master erroneously concluded that such standard and schedule of service fixed by the Council was not a maximum schedule but a minimum schedule for regular service.

And for the further reason that the order of the Commission was made at a time when no such increase of schedule regular existed therefore the Company was offering operating costs on a basis never before the Commission and never approved by it.

(7) The Master allowed in his operating expenses the sum of $11,415.24, Account 90 (Ex. C. C. p. 21), to-wit: amortized valuation expense before the Railroad & Warehouse Commission to be spread over five (5) years, total of approximately $57,000; whereas the City of Duluth claims that in a confiscatory rate case such expense must be considered abnormal, unusual, special and not to be charged as operating expense, in this proceeding for many reasons.

(8) The Master allowed in operating expenses on account 12 for snow and ice removal, a sum of $4,341.09. Whereas the City and State showed that this is in excess of a proper, usual and ordinary charge in said amount (See Commissioners' Ex. CC. p. 42 and testimony).

(9) The Master did not deduct on account 15 the sum of $2,203.92 expended in excess of the usual and normal expenditures on said account.

Whereas the City and State claims that such amount [fol. 932] should be deducted from operating expenses (See

Commissioners' Ex. CC. p. 42 and accompanying testimony).

(10) Although the Master deducted $12,000 in account No. 86 for sums paid to the attorneys for the plaintiff in conducting this Federal Court litigation, he did allow of said sum $3,000 by amortizing and spreading it over a period of 5 years; whereas the City and State claim that such expense is not a proper nor normal expense and the said $3,000 so allowed by the Master should be further deducted from a statement of operating expenses (See Commissioners' Ex. CC. p. 42 and accompanying testimony).

If the above claims of the City and State totalling $79,143 as further reductions to be made from the operating expenses as determined by the Master, are established in any substantial degree, the net revenue of the Company would be correspondingly increased and to such amount as it is submitted should overthrow the final recommendation of the Master to the Court.

VI

Defendant excepts to the report of the Master in his failing to make findings of fact upon the following relevant issues material to proper determination of the case.

(1) Failure of the Master as requested in brief and argument to find the amount taken from the depreciation reserve fund furnished in operating expenses paid by the public from 1909 to 1921 inclusive and not expended in renewals, but put exclusively in additions, betterments, new equipment or extensions, which additions, betterments, new equipment and extensions would show up in the inventory of the physical property, the agreed cost of which at agreed unit prices is in the record stated to be $3,487,020. It was claimed by the City that the amount so expended was $704,000 as the difference between the amounts credited to the said fund and charged against it specifically for renewals and replacements.

(2) The City requested from the Master a special finding [fol. 933] of fact upon the issues material to a proper determination of the case as to what was in Duluth and its general locality as compared with enterprises of banking,

merchandising, manufacturing and similar enterprises in the City of Duluth and vicinity, an annual percentage of return upon their capital invested, but the Master has made no such finding, which situation would naturally compel the Court to go to the evidence to make such a finding which the theory of reference to the Master is intended to avoid. Whereas it is manifest that it is a material and a vital fact, perhaps controlling and dominating, in the final determination of the pending case as to what is or was at the date of the Commission's order from the evidence undisputed, in the record, the customary, usual and ordinary rate of annual return upon capital sought and usually obtained by such enterprises or those as nearly similar to the Duluth Street Railway Company as the nature of things would permit. It being the claim of the City that the Duluth Street Railway Company stands superior in its prospective permanency and lack of risk to that of any other such named enterprise and that none of such named enterprises would hesitate to accept and invest on the basis of a reasonable expectency of return of 6% per annum on their capital at date of Commission's order. Challenge of the evidence is offered upon these propositions.

3. While the Master did make a specific finding as to the market value of the bonds first and second, of the Company, it did not make a specific finding as to the total market value of its bonds and stock, which is one of the elements mentioned in Smythe vs. Ames, 169 U. S. 466 to be considered. It is claimed by the City that such market value would not exceed the sum of $3,448,180.00.

VII

The said defendant excepts to the finding and conclusion of the Master expressed in finding No. IX of his report upon all the grounds and for all the reasons hereinabove stated as to all other exceptions of the defendant; it especially excepts on the further ground that in the admitted absence of any trial of the combination rate ordered by the Commission, the evidence in the record is insufficient to overthrow the judgment and estimate of the Railroad & Warehouse Commission of the State of Minnesota that its rates would prove adequate; because the evidence to support [fols. 934–957] such claim of the plaintiff is too speculative,

uncertain, conjectural and unreliable to justify any conclusion that the enforcement of said rates and said order would deprive the plaintiff of its property without just compensation or that a straight six-cent passenger fare is, or was necessary to prevent such confiscation.

And especially on the ground that the evidence, such as it is, clearly preponderates in support of the conclusion of the Commission that the said combination rate ordered by the Commission would have been adequate and that it justifies the conclusion that it would not have been confiscatory if put into effect.

And especially because the Court cannot, it is submitted, fairly say that it was impossible for a fair-minded board, the State Railroad & Warehouse Commission of Minnesota, to come to the conclusion which it reached, to wit, that the combination rate would prove adequate.

Dated at Duluth, Minnesota, this 19th day of December, 1923.

John B. Richards, City Attorney, Attorney for City of Duluth, City Hall, Duluth, Minnesota.

[File endorsement omitted.]

[fol. 958] In United States District Court

[Title omitted]

Final Decree—Filed January 24, 1925

This case came on for hearing on the evidence, the report and findings of the Master, the exceptions thereto by the respective parties and the rulings of the Master thereon, and, after argument by counsel, upon consideration thereof,

It was ordered, adjudged and decreed as follows, viz.:

1. That on December 31, 1921, the value of the plant and property of the plaintiff employed by it and used and useful in the transportation of passengers on its street cars in the City of Duluth, was the sum of $5,009,510.00, upon which the plaintiff is entitled to a net annual return equal to 7½% of said amount, or $375,713.25.

2. That the reasonable, necessary and ordinary operating expenses of the plaintiff are, and will be, at least, $1,078,671.42 per annum, and its taxes, State and Federal, [fol. 959] will amount to at least $112,352.79 per annum, amounting in all to $1,191,024.39.

3. That, had the rates and charges prescribed by the Railroad and Warehouse Commission of Minnesota in its certain order made and entered on the 13th day of July, 1922, been in force, the plaintiff would not, and could not, have collected from its passengers in the City of Duluth more than $1,393,831.52 per annum and would have received from non-operating and other revenue no more than $15,202.62 per annum, resulting in a total annual revenue to plaintiff under said rates and charges of not more than $1,409,034.14, leaving, as a net annual revenue to the plaintiff, as a return upon its property in the City of Duluth, of no more than $218,009.75.

4. That the order of the Railroad and Warehouse Commission of the State of Minnesota, dated July 13, 1922, establishing rates and fares to be charged and collected by the plaintiff for the transportation of passengers on its street cars in the City of Duluth from and after the 1st day of August, 1922, would, if enforced, deprive the plaintiff of its property without due process of law, and deny to the plaintiff the equal protection of the law, and take from the plaintiff its property, without compensation; and said order was, and is, contrary to the provisions of the Constitution of the United States.

5. That the defendants and each of them, their agents, servants, attorneys, employes, and the successors of each and all of them, be and they are hereby enjoined and prohibited from in any way enforcing or attempting to enforce the schedule of rates and charges prescribed in the order of the defendant, Railroad and Warehouse Commission, dated July 13, 1922, and from in any manner interfering with the property or operations of the plaintiff under color of or by reason of said order, and from interfering with [fol. 960] plaintiff charging a rate of fare for carrying passengers within the City of Duluth not exceeding six cents for each passenger upon the condition, however, upon which this decree is expressly granted, that until the establish-

ment by the Railroad and Warehouse Commission of the State of Minnesota of just and reasonable rates of fare for the transportation of passengers upon the street cars in the City of Duluth or until the further order of this court, the plaintiff shall not charge or collect more than six cents for one continuous trip of each passenger upon its street cars within the City of Duluth, and that a writ of injunction, in accordance herewith, be issued out of and under the seal of this court by the Clerk thereof.

6. That the bond heretofore given by the plaintiff herein upon the issuance of the temporary injunction be discharged and that plaintiff be relieved from and no longer required to carry out the provisions of the order of the court dated August 24, 1922, requiring it to sell five tickets for thirty cents, each ticket good for one ride, together with a coupon containing the terms and provisions therein stated.

7. That this decree shall take effect and be in force from and after the entry thereof, and the Court retains jurisdiction of this cause to enforce the terms hereof and to entertain applications for further orders when necessary to carry out the provisions thereof, and to amend, vacate or modify the same, if necessary, at the application of any party hereto, upon twenty days' notice.

8. That the compensation of the Special Master be fixed at $10,000 00
and of the Reporter at 780 00
and that these amounts be taxed and allowed as costs in this proceeding. That the follow-
[fol. 961] ing amounts paid out by the plaintiff by taxed and allowed as costs:

Premium on temporary injunction bond	$300 00
Marshal's fees paid	36 36
Clerk's fees paid	20 00
Total amount costs taxed	$11,136 36

That the plaintiff has paid all of said amounts except the sum of $520.00, which sum was paid to the Reporter, one-half by the defendant City of Duluth and one-half by the defendant Railroad and Warehouse Commission; that

the amount so paid by the plaintiff, being the sum of $10,616.36, be paid in part by the defendants to the plaintiff, in the proportions:

Railroad and Warehouse Commission	Nothing.
City of Duluth	$5,178 18

Wilbur F. Booth, Judge.

Let the foregoing Decree be filed, rendered and entered of record this 24th day of January, A. D. 1925.

Wilbur F. Booth, Judge.

[File endorsement omitted.]

[fol. 962] In United States District Court

[Title omitted]

Injunction—Filed February 2, 1925

The President of the United States to Railroad and Warehouse Commission of the State of Minnesota, O. P. B. Jacobson, Frank W. Matson, Ivan Bowen, Clifford L. Hilton, as Attorney General of the State of Minnesota, and City of Duluth, a municipal corporation, Greeting:

Pursuant to the order and decree of Honorable Wilbur F. Booth, Judge of said court, entered on the 24th day of January, A. D. 1925, you, Railroad and Warehouse Commission of the State of Minnesota, O. P. B. Jacobson, Frank W. Matson, Ivan Bowen, Clifford L. Hilton, as Attorney General of the State of Minnesota, the City of Duluth, a municipal corporation, and each of you, your agents, servants, attorneys, employes and the successors of each and all of you and them, are hereby enjoined and prohibited from in any way enforcing or attempting to enforce [fol. 963] the schedule of rates and charges prescribed in the order of the defendant, Railroad and Warehouse Commission, dated July 13, 1922, and from in any manner interfering with the property or operations of the plaintiff under color of or by reason of said order and from interfering with plaintiff charging a rate of fare for carrying pas-

sengers within the City of Duluth not exceeding six cents for each passenger, and this you are not to omit under the penalty which may ensue.

Witness the Honorable Wilbur F. Booth, Judge of said Court, and the seal of said court hereunto affixed at St. Paul in said District, this 27th day of January, A. D. 1925.

Joel M. Dickey, Clerk. (Seal.)

[File endorsement omitted.]

[fol. 964] In United States District Court

[Title omitted]

Petition of City of Duluth for Appeal and Order Allowing Same—Filed April 24, 1925

To the Honorable William A. Cant, District Judge:

The above named defendant, City of Duluth, intervenor, feeling aggrieved by the decree made and entered on the 24th day of January, 1925, in the above entitled cause in and by which a final decree of injunction against said defendants was granted hereby appeals from the said decree to the Supreme Court of the United States; the reasons for said appeal being set forth in the assignment of errors herewith filed; and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers on which said record was made duly authenticated may be sent to the Supreme Court of the United States, City of Washington, D. C.

Dated April 21, 1925.

John B. Richards, Attorney for Defendant and Appellant-Intervenor, the City of Duluth.

[fol. 965] And now, towit, on April 23rd, 1925, It is ordered that the appeal of the City of Duluth be allowed as hereinabove prayed for.

Wm. A. Cant, U. S. District Judge, District of Minnesota, Third Division.

[File endorsement omitted.]

[fol. 966] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL BY RAILROAD AND WAREHOUSE COMMISSION ET AL., AND ORDER ALLOWING SAME—Filed April 24, 1925

To the Honorable William A. Cant, District Judge:

The above named defendants, The Railroad and Warehouse Commission of the State of Minesota, O. P. B. Jacobson, Frank W. Matson, Ivan Bowen and Clifford L. Hilton, feeling aggrieved by the decree made and entered on the 24th day of January, 1925, in the above entitled cause in and by which a final decree of injunction against said defendants was granted hereby appeals from the said decree to the Supreme Court of the United States; the reasons for said appeal being set forth in the assignment of errors herewith filed; and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers on which said record was made duly authenticated may be [fols. 967-997] sent to the Supreme Court of the United States, City of Washington, D. C.

Dated April 21, 1925.

Clifford L. Hilton, Attorney General; Ernest C. Carman, Assistant Attorney General, Attorneys for Defendants, 102 State Capitol, St. Paul, Minnesota.

And now, to-wit, on April 23, 1925, it is ordered that the appeal of the defendants, Railroad and Warehouse Commission of the State of Minnesota, O. P. B. Jacobson, Frank W. Matson, Ivan Bowen and Clifford L. Hilton, be allowed as hereinabove prayed for.

Wm. A. Cant, United States District Judge, District of Minnesota.

[File endorsement omitted.]

[fol. 998] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 999] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY APPELLANTS OF PARTS OF RECORD TO BE RELIED UPON—Filed October 22, 1925

Come now the railroad and warehouse commission of the State of Minnesota, O. P. B. Jacobson, Frank W. Matson, Ivan Bowen, and Clifford L. Hilton, being all the appellants in the above entitled action except the City of Duluth, and pursuant to paragraph 9 of Rule 11 of this court, do hereby designate the points upon which they intend to rely on this appeal and the parts of the record deemed necessary for the consideration thereof, to-wit:

I

For the reversal of the judgment and dismissal of the decree of the lower court, these appellants rely upon and do claim that said lower court had no jurisdiction of the subject matter of this action because, prior to the commencement of this action, the Duluth Street Railway Company had voluntarily consented and agreed with the State of Minnesota and the City of Duluth, Minnesota, that all matters in controversy in this action should be determined finally, and conclusively, and exclusively by the railroad and [fol. 1000] warehouse commission and the state courts of Minnesota under and pursuant to all the provisions of chapter 278, Laws of Minnesota 1921; particular reference being made to the admitted fact that said Duluth Street Railway Company had, long prior to the commencement of this action, filed its acceptance of and consent to be bound by the terms of said state statute, section 2 of which reads as follows:

"Every grant that has been heretofore, or that shall be hereafter, made to a street railway by the state or any city shall become and it shall thereafter be, an indeterminate permit, upon such street railway executing and filing with the clerk of the city in which said street railway is located, a written declaration that it desires that such grant shall become an indeferminate permit and consent that the terms of this act shall apply to and govern the ownership, control, management, maintenance and operation of the street

railway property of said street railway. Upon such street railway filing such declaration and consent, the city clerk shall issue to such street railway a certificate that such declaration and consent has been filed in his office. When such certificate shall be filed with the secretary of state, such grant subject to the provisions of this act shall become an indeterminate permit to own, operate, manage and control any street railway property, or any part thereof, within such city under the terms and conditions of the grant that shall have been theretofore made by the state or any such city and be then in force; but all of the terms, conditions and obligations of such existing grant, except as herein otherwise specifically provided, shall continue in force so long as such indeterminate permit shall continue. Such indeterminate permit shall continue in full force unless and until the city shall acquire the street railway property of such street railway within the limits of such city, or unless terminated or modified by the Legislature of the State of Minnesota as hereinafter provided."

II

For the reversal of the judgment and decree of the lower court, these appellants further rely upon and do claim that said lower court did misinterpret and misconstrue section 10 of chapter 278, Laws of Minnesota 1921, reading as follows:

"Any city or street railway may appeal from any order, ruling or decision of the Commission duly made after hearing to the district court of the county in which the city affected by any such order, ruling or decision is located, and said appeal shall be taken and all proceedings thereunder [fol. 1001] had as provided for by sections 4191 to 4199, both inclusive, General Statutes of Minnesota for 1913, so far as the same may be applicable. Upon such appeal the matters involved therein shall be tried and determined by the court without a jury, in the same manner as though originally commenced therein, provided that the findings and order of the Commission shall be received in evidence upon such trial, but the court shall in no event be bound thereby. In case of an appeal involving the value of the property for the purpose of purchase by the city, such appeal shall be heard by three (3) judges, and if there are less than three

judges in such district, then the Governor shall designate one or more district judges to sit upon any such case so that the same may be determined by such judges as aforesaid. Upon any appeal the district court shall have jurisdiction of and shall try the whole matter in controversy, including matters of fact as well as law, and make findings upon all material facts, and in any case involving rates or the value of street railway property shall find and determine the fair value of such property and also what is a reasonable rate of return thereon, and shall affirm, modify or reverse any order or finding of such commission as may be required by law. The judgment or any order of such court shall be certified to said commission, and the commission shall thereupon modify, reverse or put into effect its order or findings so as to conform to the judgment, order and findings of such court. Any party to an appeal or other proceeding in the district court under this act may appeal from the final judgment or from any final order therein in the same cases and manner as in civil actions. The appeal may be filed in the Supreme Court during any term thereof and shall be immediately entered upon the calendar and heard upon such notice as the court may prescribe, as provided for by section 4200, General Statutes of Minnesota for 1913, as far as the same may be applicable."

in that the said lower court held that said section of said state law did not confer upon the district courts of the State of Minnesota the power in this case to determine the fair value of, and the proper rate of return upon, the property of the respondent Duluth Street Railway Company used and useful as an operating system in the city of Duluth, Minnesota, after and on appeal from and as supplementary to the finding of said value and rate of return in the first instance by the railroad and warehouse commission of Minnesota as in said state law provided. The error of said trial court particularly lies in its refusal to dismiss this action as prematurely brought, upon motion duly made by these appellants, it being conceded that this action had been brought before said state district courts had been afforded any opportunity to act under said state law in the [fol. 1002] final fixing and determination of the fair value of, and the proper rate of return upon, the property of said Duluth Street Railway Company as in said state law pro-

vided. Reference is hereby made to the second assignment of error by these appellants.

III

The parts of the record which these appellants deem necessary for the considration of th points hereinabove stated are as follows:

1. Bill of Complaint;
2. Answers of all defendants;
3. Motions by defendants to dismiss this action for want of jurisdiction and as prematurely brought, with accompanying affidavits;
4. Order denying motions described last above;
5. Report of Special Master, Thos. D. O'Brien;
6. Final Decree;
7. Injunction.

This statement of points and designation of parts of the record to be printed is made without prejudice to the rights of the City of Duluth in the same premises.

Respectfully submitted, Clifford L. Hilton, Attorney General of Minnesota; Ernest C. Carman, Assistant Attorney General of Minnesota, Attorneys for all Appellants Except the City of Duluth.

[fol. 1003] Due and personal service of the within designation of points is hereby admitted at Duluth, Minnesota, this 19th day of October, 1925.

Washburn, Bailey & Mitchell, Attorneys for Duluth Street Railway Company. John B. Richards, City Attorney of Duluth, Minnesota.

[fol. 1004] [File endorsement omitted.]

[fol. 1005] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by the City of Duluth of Parts of Record to be Printed and Proof of Service—Filed October 23, 1925

Comes now the City of Duluth, being one of the appellants in the above entitled action, and pursuant to Paragraph 9 of Rule 11 of this Court, does hereby designate the

points upon which they intend to rely on this appeal, and the parts of the record deemed necessary for the consideration thereof, to-wit:

I

For the reversal of the judgment and dismissal of the decree of the lower court, these appellants rely upon and do claim that said lower court had no jurisdiction of the subject matter of this action because, prior to the commencement of this action, the Duluth Street Railway Company had voluntarily consented and agreed with the State of Minnesota and the City of Duluth, Minnesota, that all matters in controversy in this action should be determined finally, and conclusively, and exclusively by the railroad and warehouse commission and the state courts of Minnesota under and pursuant to all the provisions of chapter 278, Laws of Minnesota, 1921; particular reference being made to the admitted fact that said Duluth Street Railway [fol. 1006] Company had, long prior to the commencement of this action, filed its acceptance of and consent to be bound by the terms of said state statute, section 2 of which reads as follows:

"Every grant that has been heretofore, or that shall be hereafter, made to a street railway by the state or any city shall become and it shall thereafter be, an indeterminate permit, upon such street railway executing and filing with the clerk of the city in which said street railway is located, a written declaration that it desires that such grant shall become an indeterminate permit and consent that the terms of this act shall apply to and govern the ownership, control, management, maintenance and operation of the street railway property of said street railway. Upon such street railway filing such declaration and consent the city clerk shall issue to such street railway a certificate that such declaration and consent has been filed in his office. When such certificate shall be filed with the secretary of state, such grant subject to the provisions of this act shall become an indeterminate permit to own, operate, manage and control any street railway property, or any part thereof, within such city under the terms and conditions of the grant that shall have been theretofore made by the state or any such city and be then in force; but all of the terms, con-

ditions and obligations of such existing grant, except as herein otherwise specifically provided, shall continue in force so long as such indeterminate permit shall continue. Such indeterminate permit shall continue in full force unless and until the city shall acquire the street railway property of such street railway within the limits of such city, or unless terminated or modified by the Legislature of the State of Minnesota as hereinafter provided."

II

For the reversal of the judgment and decree of the lower court, these appellants further rely upon and do claim that said lower court did misinterpret and misconstrue section 10 of Chapter 278, Laws of Minnesota 1921, reading as follows:

"Any city or street railway may appeal from any order, ruling or decision of the Commission duly made after hearing to the district court of the county in which the city affected by any such order, ruling or decision is located, and said appeal shall be taken and all proceedings thereunder had as provided for by sections 4191 to 4199, both inclusive, General Statutes of Minnesota for 1913, so far as the same may be applicable. Upon such appeal the matters involved therein shall be tried and determined by the court without a jury, in the same manner as though originally commenced therein, provided that the findings and order of the Commission shall be received in evidence upon such trial, but the court shall in no event be bound thereby. In case of an appeal involving the value of the property for the purpose of purchase by the city, such appeal shall be heard by three (3) judges, and if there are [fol. 1007] less than three judges in such district, then the Governor shall designate one or more district judges to sit upon any such case so that the same may be determined by such judges as aforesaid. Upon any appeal the district court shall have jurisdiction of and shall try the whole matter in controversy, including matters of fact as well as law, and make findings upon all material facts, and in any case involving rates or the value of street railway property shall find and determine the fair value of such property and also what is a reasonable rate of return thereon, and shall

affirm, modify or reverse any order or finding of such commission as may be required by law. The judgment or any order of such court shall be certified to said commission, and the commission shall shall thereupon modify, reverse or put into effect its order or findings so as to conform to the judgment, order and findings of such court. Any party to an appeal or other proceeding in the district court under this act may appeal from the final judgment or from any final order therein in the same cases and manner as in civil actions. The appeal may be filed in the Supreme Court during any term thereof and shall be immediately entered upon the calendar and heard upon such notice as the court may prescribe, as provided for by section 4200, General Statutes of Minnesota for 1913, as far as the same may be applicable."

in that the said lower court held that said section of said state law did not confer upon the district courts of the state of Minnesota the power in this case to determine the fair value of, and the proper rate of return upon, the property of the respondent, Duluth Street Railway Company used and useful as an operating system in the city of Duluth, Minnestota, after and on appeal from and as supplementary to the finding of said value and rate of return in the first instance by the railroad and warehouse commission of Minnesota as in said state law provided. The error of said trial court particularly lies in its refusal to dismiss this action as prematurely brought, upon motion duly made by these appellants, it being conceded that this action had been brought before said state district courts had been afforded any opportunity to act under said state law in the final fixing and determination of the fair value of, and the proper rate of return upon, the property of said Duluth Street Railway Company as in said state law provided. Reference is hereby made to the thirteenth assignment of error by this appellant.

III

Final injunction by the decree appealed from against the [fol. 1008] enforcement of the order of the Railroad and Warehouse Commission raising the rate from five cents and establishing it at six cents cash fare and five tickets for twenty-five cents, should not have been granted until a practical test by experience had been made for an adequate time of the rate so established, and no test was made or allowed.

IV

That the valuation made by the Commission and fixed at Four Million, Five Hundred Ninety-nine Thousand, Nine Hundred Seventy-eight and 22/100 Dollars, ($4,599,978.22) was itself attacked by the city by its answer in intervention as excessive; that it should not have been raised by the decree, and that all the elements so entering into the value were in dispute between the parties and in evidence, and under exceptions taken to the master's report of valuation.

V

That the proper normal annual expense of operation, exclusive of taxes, state and federal, estimated by the master and approved by the final decree, at One Million, Seventy-eight Thousand, Six Hundred Seventy-one and 42/100 ($1,078,671.42), Dollars was in dispute by evidence, was excessive and should have been further reduced by a sum not less than Seventy Thousand ($70,000.00) Dollars, and should not have exceeded One Million Eight Thousand ($1,008,000.00) Dollars.

VI

That the rate of return fixed by the Commission at 7½%, approved by the master and by the decree appealed from, was not justified by the evidence of conditions existing at Duluth, Minnesota, and in the State of Minnesota, and that it should not have been found at a sum in excess of 6%; and that such return at 6% or at least 6½% was not confiscatory, and because the master refused to make a finding as to what was a fair return upon similar enterprises at Duluth, Minnesota ,and his refusal was not corrected by the [fol. 1009] court on exceptions taken.

VII

That the evidence in the record with reasonable certainty shows that the results of a practical and fair test of the rates fixed by the commission would have produced an annual net revenue in excess of 8½% on the valuation as fixed by the commission, and as approved by the master,

in addition to the depreciation annuity of 2½%, approved by the commission and by the master, and not rejected by the court, making a total return, including depreciation of not less than 11% on such valuation; that the increase of approximately Four Hundred Thousand ($400,000.00) Dollars made by the court, in its decree was in error and even though accepted as a basis for calculating the net annual revenue under the commission's order would not have reduced the same, including depreciation to an appreciable extent, nor to an amount less than 10% total return.

VIII

The parts of the record which this appellant, the City of Duluth, deems necessary for the consideration of the points hereinabove stated, are as follows:

1. Bill of Complaint.

2. Answers of all defendants.

3. Motions by defendants to dismiss this action for want of jurisdiction and as prematurely brought, with accompanying affidavits.

4. Order denying motions described last above.

5. Report of Special Master, Thos. D. O'Brien.

6. Final Decree.

7. Injunction.

[fol. 1010] 8. Exceptions of the City of Duluth to the Special Master's report.

9. The transcript containing the oral testimony admitted.

Respectfully submitted, John B. Richards, City Attorney of Duluth, City Hall Building, Duluth, Minnesota.

[fol. 1011] Due and personal service of the within Designation is hereby admitted at Duluth, Minnesota, by copy thereof, this 21st day of October, 1925.

Oscar Mitchell and W. D. Bailey, Attorneys for Respondent.

[fol. 1012] [File endorsement omitted.]

Endorsed on cover: File No. 31,493. Minnesota D. C. U. S. Term No. 770. The Railroad and Warehouse Commission of the State of Minnesota, O. P. B. Jacobson et al., and City of Duluth, appellants, vs. The Duluth Street Railway Company. Filed October 9th, 1925. File No. 31,493.

Office Supreme Court,
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WM. R. STANSBU
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1925.

No. [redacted] 229

THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, O. P. B. JACOBSON, ET AL, AND CITY OF DULUTH,
Appellants,

vs.

THE DULUTH STREET RAILWAY COMPANY,
Respondent.

(Appeal from the District Court of the United States for the District of Minnesota.)

31493

BRIEF FOR THE ATTORNEY GENERAL AND THE RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA.

CLIFFORD L. HILTON,
Attorney General of Minnesota,

ERNEST C. CARMAN,
Assistant Attorney General
of Minnesota,
Attorneys for all Appellants
except the City of Duluth,
102 State Capitol,
St. Paul, Minnesota.

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J46012

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Reference to Opinion in Court Below.

The decision of the court below, from which this appeal was taken, is reported as Duluth Street Railway Company v. Railroad and Warehouse Commission, 4 Fed. 2nd Series, page 543.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1925.

No. 770.

THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, O. P. B. JACOBSON, ET AL, AND CITY OF DULUTH,
Appellants,

vs.

THE DULUTH STREET RAILWAY COMPANY,
Respondent.

(Appeal from the District Court of the United States for the District of Minnesota.)
31493

BRIEF FOR THE ATTORNEY GENERAL AND THE RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA.

STATEMENT AS TO JURISDICTION OF THIS COURT.

This is a separate appeal by the attorney general of Minnesota and the members of the railroad and warehouse commission of Minnesota (joint parties defendant with the City of

Duluth, Minnesota, intervenor in the court below) from a final decree in equity in favor of the Duluth Street Railway Company as plaintiff in the United States district court for the district of Minnesota, dated January 24th, 1925 (R. 732) enjoining and prohibiting these appellants, through formal writ of injunction later issued (R. 735), from enforcing or attempting to enforce a schedule of rates and charges prescribed by said railroad and warehouse commission (acting entirely under chapter 278, Session Laws of Minnesota for 1921) for the Duluth Street Railway Company in the city of Duluth, Minnesota; and enjoining and prohibiting these appellants from interfering with said Duluth Street Railway Company charging a fare of six cents each for carrying passengers within said city of Duluth "until the establishment by the Railroad and Warehouse Commission of the State of Minnesota of just and reasonable rates of fare for the transportation of passengers upon the street cars in the city of Duluth or until the further order" of said court. Said decree of the court below was also effective against the city of Duluth, Minnesota, which has also appealed to this court.

Said decree of the court below was expressly based upon the ground that said order of the Minnesota railroad and warehouse commission would, if enforced, "deprive the plaintiff of its property without due process of law, and deny to the plaintiff the equal protection of the law, and take from the plaintiff its property, without compensation * * * contrary to the provisions of the Constitution of the United States" (R. 733).

This appeal was taken and allowed on April 23rd, 1925, under section 238 of the Judicial Code (36 Stat. L. 1157), shortly prior to the effective date (May 13, 1925) of the jurisdictional act of February 13, 1925, printed as an appendix to 266 United States Reports.

These appellants, leaving all else to the separate appeal of the city of Duluth, have brought here for decision two claims: (1) That the district court of the United States for the district of Minnesota had no jurisdiction at the time this action was commenced; and (2) that, in any event, this action was prematurely brought and should have been dismissed.

These claims were duly presented in the court below prior to trial on the merits by motion to dismiss (R. 52), which was denied (R. 55); and were again presented by objections to the introduction of evidence or taking of testimony at the trial of the case, which objections were overruled (R. 58 to 64); and were still later presented and argued on exceptions to the report of the special master (Original Transcript, 923 to 927), which were overruled and said contentions decided adversely to these appellants (Duluth Street Railway v. Railroad and Warehouse Commission, 4 Fed. 2nd Series 543).

The contention of these appellants may be here restated as it was originally stated in the motion to dismiss prior to trial, made upon the ground that "the bill of complaint does not state a cause of action against these defendants" (R. 52), and upon the further ground:

> "That it conclusively appears from the pleadings that all the acts and things done or threatened by these defendants as alleged in the complaint were done and are threatened, if at all, under and pursuant to chapter 278 Session Laws of Minnesota 1921; and that it further conclusively appears that said plaintiff, long prior to the doing or threatening of any of said acts or things, had voluntarily consented, agreed and contracted for a valuable consideration (i. e. the granting of an indeterminate permit to said plaintiff in lieu of its franchise) that all said acts or things done or threatened as alleged in the complaint might and should be done by these defendants, and that said plaintiff would submit to, abide and be

bound by the rates of fare and charges fixed and established by the defendant Railroad and Warehouse Commission of the State of Minnesota subject only to change or modification by the proper district court of said state of Minnesota and by its supreme court as provided in said chapter 278 Session Laws of Minnesota 1921, and particularly sections 5, 8, 9, 10 and 14 thereof."

To which may be added these objections to the introduction of any evidence in the court below (R. 59 to 60), to-wit:

"Mr. Carman: Defendant Railway and Warehouse Commission, of the State of Minnesota, O. P. B. Jacobson, Frank W. Matson, Ivan Bowen and Clifford L. Hilton, object to the introduction of any evidence, or taking of any testimony against them on the ground and for the reason that the District Court of the United States for the District of Minnesota, Third Division, in which this action is brought, has no jurisdiction over these objecting defendants.

"Mr. Richards: The City of Duluth, Intervenor, makes the same objection.

"The objection was overruled by the Master, and exception was taken to the ruling by the defendants and the Intervenor.

"Mr. Carman: The same defendants make the same objection last stated upon the further ground and for the further reason that said District Court of the United States, District of Minnesota, Third Division, has no jurisdiction over the matters alleged in plaintiff's cause of action in the Bill of Complaint of said plaintiff, the said Street Railway Company.

"Mr. Richards:- The City of Duluth, Intervenor, makes the same objection.

"The Master: Objection overruled. Mr. Carman, what is the distinction in the last two motions,—something you wanted me to note?

"Mr. Carman: I want to get your ruling, specifically, without stating my objections in such form as to make it

necessary for a ruling upon the objection to touch more than one point. One of these objections is to go to jurisdiction of the person, and the other as to the subject matter. That is the reason for making these objections so nearly alike.

"The Master: Overruled.

"Exception by the defendants and the City, Intervenor."

STATEMENT OF THE CASE.

Prior to the year 1921 the Duluth Street Railway Company was, and for many years had been, bound by a franchise with the city of Duluth, Minnesota, under which the maximum fare that could be charged and which was being charged and collected for transportation of passengers in the city of Duluth was five cents each (R. 17; 702; 132 to 139). This franchise contract, by its terms, was to continue in effect until the year 1931 (R. 132). For the purpose of providing a way whereby the Duluth Street Railway Company, and others similarly situated, might terminate such franchise contracts the legislature of Minnesota enacted the so-called Brooks-Coleman Act, being chapter 278 Session Laws of Minnesota 1921 (City of Duluth v. Railroad & Warehouse Commission, 209 N. W. 10) which, for the convenience of the court, is printed as an appendix to this brief. It also appears as sections 4816 to 4830, General Statutes Minnesota 1923.

Said legislative act provides in section 2 thereof that every franchise or grant to a street railway company shall become an indeterminate permit whenever such street railway company shall execute and file a written declaration that it desires that such franchise shall become an indeterminate permit and that it consents

"that the terms of this Act shall apply to and govern the ownership, control, management, maintenance and

operation of the street railway property of said street railway."

Such declaration and consent was filed by the Duluth Street Railway Company on April 28th, 1921, fourteen days after the act became effective (R. 15). Some provisions of the act to which the company assented may properly be included in this statement of the case.

Section 2 of said act provides that, upon the filing of such declaration and consent by any street railway company, its franchise or grant shall become an indeterminate permit subject to the provisions of the act, and that all existing terms and conditions of such franchise shall remain in force except as expressly provided otherwise in said act.

Section 3 of said act confers upon the Minnesota railroad and warehouse commission

> "initial and exclusive power and authority * * * to fix and establish rates of fare and charges by a street railway for carrying passengers, subject to the powers of the district court in case of appeal thereto"

as provided in the act.

Section 8 of said act provides that

> "the rates which the street railway is authorized to charge and collect under existing franchises shall be and remain the authorized and lawful charge until a rate is fixed by the Commission under the provisions of this Act."

Other sections of the act prescribe the procedure before and duties of the railroad and warehouse commission (hereinafter called the commission), and provide that at the request of either the street railway company or the city the commission shall find and determine the value of the street railway property *according to the standards prescribed by the act*, a proper

rate of return thereon, and a rate of fare which will yield such return—subject to change at any time upon further hearing ordered by the commission on its own motion or on petition of either the city or the company.

Section 10 of the act provides for an appeal from any order of the commission only to

> "the District Court of the county in which the city affected by any such order, ruling, or decision, is located."

It is further provided as follows:

> "Upon any appeal the District Court shall have jurisdiction of and shall try the whole matter in controversy including matters of fact as well as law, and make findings upon all material facts, and in any case involving rates or the value of street railway property shall find and determine the fair value of such property and also what is a reasonable rate of return thereon, and shall affirm, modify or reverse any order or finding of such commission as may be required by law. The judgment or any order of such court shall be certified to said commission and the commission shall thereupon modify, reverse or put into effect its order or findings so as to conform to the judgment, order and findings of such court."

From such district court an appeal is allowed to the supreme court of Minnesota.

Section 14 of the act reserves to the state of Minnesota the right, at its pleasure and without liability, to amend or repeal the act, and to cancel or modify any indeterminate permit that may ever exist thereunder; and it further provides that permits

> "shall be granted only to a Minnesota corporation, and any assignment or transfer thereof shall be to a Minnesota corporation."

The Duluth Street Railway Company, after having consented to and having agreed to be bound by said act in consideration of the grant thereunder to said company of an indeterminate permit, filed a petition requesting the commission to fix and establish the value of its street railway property and rates of fare to be charged in accordance with the terms of said chapter 278, Laws of Minnesota 1921 (R. 15 to 18).

Said petition alleged, among other things, that

> "on the 28th day of April, 1921, your petitioner was the owner of certain franchises to operate a street railway system in the city of Duluth" (R. 15);

that said franchises were converted into an indeterminate permit under the act (R. 16); and that

> "*Pursuant to said franchises or grants that became an indeterminate permit* * * * the rate of fare charged by petitioner for transporting passengers within the city of Duluth *is five cents* (5¢) per passenger" (R. 17).

The commission, after due hearing, issued its order dated July 13th, 1922, *to become effective August 1st, 1922* (R. 26, second), *raising the former franchise or contract rate of fare from five cents to a higher level*, as shown by the following provision (R. 26, second):

> "That the Duluth Street Railway Company is hereby authorized to charge for its service in the transportation of passengers within the city of Duluth Six (6) cents cash fare, and shall issue tickets or tokens good for rides on its said lines within the city of Duluth and charge therefor not to exceed Twenty-five (25) cents for Five (5) rides, effective August 1, 1922."

On ~~August~~ July 18th, 1922, within five days after said order of the commission was issued *and thirteen days before it did or could become effective* (R. 1), and before said order had been or could be in any manner reviewed or modified or acted upon

by the state district court of St. Louis county, Minnesota (wherein the city of Duluth is located), as provided in section 10 of said chapter 278, Laws of Minnesota 1921, the Duluth Street Railway Company instituted this proceeding by filing its bill of complaint in equity in the district court of the United States for the District of Minnesota, setting up a claim that the commission had erred in its valuation and in the fixing of a rate of fare to be charged (R. 4 to 7) and alleging that by reason thereof, if the said order of the commission *raising the existing franchise rate of fare* should be permitted to go into effect on August 1st, 1922, the company would be deprived of its property without due process of law, denied the equal protection of the law, and subjected to confiscation of its property,

> "all contrary to and in violation of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments of the Constitution of the United States" (R. 10).

The Duluth Street Railway Company, being a Minnesota corporation (R. 1), and all the defendants being citizens of Minnesota (R. 1), there was no diversity of citizenship, and the sole and only basis for the jurisdiction of the United States District Court on July 18th, 1922, was the alleged federal question above quoted; and the only equities set up in the bill of complaint were the claims that the commission had erred in its judgment of valuation and rate of fare to be charged. Admittedly, the Duluth Street Railway Company never made any attempt to appeal to, or procure any sort of action by, the state district court of St. Louis county, Minnesota, to which alone appeal lies under section 10 of the act accepted and assented to by the company (R. 141).

The United States District Court promptly granted a temporary injunction prohibiting the state authorities from putting into effect the rate of fare prescribed by the commission (R. 734), ignoring the franchise rate of 5 cents which by the terms of the act was to be in effect until superseded by a rate prescribed by the commission (sec. 8, ch. 278, Laws Minnesota 1921), and putting into effect a rate which differed from both, to-wit, a 6 cent fare or five tickets for 30 cents (R. 734). The objections and motions of these appellants, both as to the jurisdiction of the court and the prematurity of this suit if jurisdiction existed, were overruled; a special master was appointed; trial of the case proceeded before him, and after the usual exceptions to his report, then proceeded before the court; and finally a permanent injunction against less than a 6 cent fare was issued (R. 735), and this appeal followed.

SPECIFICATION OF ERRORS.

These appellants urge and rely upon the errors heretofore assigned and numbered I and II as set forth at page 977 of the Original Transcript and repeated at pages 738 to 741 of the printed record. In substance, it is claimed that the lower court erred (1) in assuming or attempting to exercise jurisdiction over the parties to, and the subject matter of, this action in equity at the time it was commenced; and (2) that, even if jurisdiction technically existed, the court erred in refusing to dismiss this action as premature and in proceeding to trial and issuing an injunction against these appellants before the state courts had acted or been given any opportunity to act as provided in chapter 278, Session Laws of Minnesota 1921.

ARGUMENT.

This court is asked to decide whether Chapter 278 Session Laws of Minnesota 1921, offered by the Minnesota legislature to appellee and others similarly situated and accepted by the Duluth Street Railway Company as offered, is a binding agreement between the State of Minnesota and the company; and, in any event, whether the company is limited first to judicial review and correction of the orders of the railroad and warehouse commission by the state district court of St. Louis county, Minnesota, as expressly provided in section 10 of said legislative act, so that

> "The judgment or any order of such court shall be certified to said commission, and the commission shall thereupon modify, reverse or put into effect its order or findings so as to conform to the judgment, order and findings of such court."

Postponing, for the moment, argument in support of our claim that the legislative act when accepted by the company became a contract between the state and the company, we shall first consider said act as an ordinary statute applicable to the Duluth Street Railway Company at the time it brought this action in the federal court at Duluth, Minnesota.

I.

In Minneapolis & St. Louis Railroad Company v. Peoria & Pekin Union Railway Company, 70 L. Ed. 460, No. 767, October Term 1925, decided April 12th, 1926, this court held that:

> "The jurisdiction of a court depends upon the state of facts existing at the time a suit is brought."

The jurisdiction of the federal court in the case at bar was invoked by the Duluth Street Railway Company (a Minnesota corporation suing Minnesota citizens and residents) upon the sole grounds that said company was being deprived of its constitutional rights guaranteed to it by "Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments of the Constitution of the United States" (R. 10). This suit was commenced on July 18, 1922 (R. 1). But on that date the order of the railroad and warehouse commission prescribing something *more than* a five cent fare (R. 26, second) had not yet become effective; and the old franchise rate of five cents was still in effect (Sec. 8, Chapter 278 Laws of Minnesota 1921). Clearly there was no *existing* confiscation of which the company could complain, for a contract or franchise rate is never confiscatory however unremunerative it may be. Opelika v. Opelika Sewer Co., 265 U. S. 215. There being no existing confiscation, there could be no *continuing* confiscation at the date this suit was commenced. And there could be no *threatened* confiscation to result from the order of the railroad and warehouse commission prescribing a *higher* rate than the existing five cent franchise rate, to be effective at a future date (R. 26, second) unless Chapter 278 Laws of Minnesota 1921 gave the Duluth Street Railway Company a right under the constitution of the United States to a non-confiscatory rate determinable by the federal courts *immediately* upon the first promulgation by the railroad and warehouse commission of an order fixing any fare *without examination, review or revision of said order by the state district court of St. Louis county, Minnesota, as expressly provided in section 10 of said state law*, and without any test of said fare so fixed by the commission to determine its adequacy. For it should be kept in mind that the state

legislative act, in addition to providing for correction of the orders of the commission by said state court, also requires the commission from time to time to change the rate or fare "as may be just" either on its own motion or that of interested parties. (Sec. 8, Ch. 278, Laws Minnesota 1921). And the state court was also endowed with full power to *suspend* the orders of the commission pending hearing in said state court; for section 10 of the act incorporates by reference sections 4191 to 4199, General Statutes of Minnesota for 1913 (now being sections 4650-4658, General Statutes Minnesota 1923), governing appeals from orders of the commission and providing for such *suspension* in section 4192 thereof (now sec. 4651 G. S. Minn. 1923). *Immediate trial* of such appeals is also provided for. (Sec. 4196 G. S. 1913; Sec. 4655 G. S. 1923).

That the state law had not created any federal constitutional right to an advanced fare immediately available to the Duluth Street Railway Company when this action was commenced is clear from the case of Henderson Water Company v. Corporation Commission of North Carolina, 269 U. S. 278, which is so apposite here that we quote from the decision at length, as follows:

> "This is an appeal under § 266 of the Judicial Code from an order refusing a temporary injunction heard before three judges. The Henderson Water Company is the owner by assignment of a franchise to furnish to Henderson, North Carolina, a supply of water. The franchise, with a term of forty years, was granted in 1892 by the city, when it was a town, to certain grantees, from whom it came in 1894 to the Water Company, which was complainant below, and is appellant here. The ordinance provided a schedule of prices for water to be furnished beyond which the grantee could not go. Later the State of North Carolina created a Corporation Commission, hav-

ing power to fix rates for public utilities of the State. 1919 Consol. Stats. of North Carolina, § § 1066, 1097-1103, 2783, 1037.

"On September 27, 1922, the complainant filed with the Corporation Commission a petition setting forth the original cost of construction of its plant, the amount expended in permanent improvements, and the earning capacity of the same under the schedule of rates provided in the franchise, and, because of the alleged inadequate return from them, asked the Corporation Commission to grant to it the right to charge rates higher by 10 per cent. The Commission heard the complaint, and March 29, 1923, ordered an increase of about one-half that asked for, to take effect July 27, 1923, with the direction that after the corporation had tried the rates fixed for six months, it might apply again for such relief as the results would justify.

"The end of the six months' test proposed was January 27, 1924. Without applying again to the Commission, the Water Company, on February 22, 1924, filed this bill to enjoin the Commission from continuing to enforce the rates fixed by the order made in the spring of 1923, on the ground that they were confiscatory.

* * * * * * * * * *

"The District Court puts refusal to grant the injunction in the present case on the ground that the complainant had not sufficiently exhausted its remedies before the Corporation Commission. We think the District Court was entirely right in this.

"It is urged on behalf of the Company that it has a constitutional right to try the question whether it is suffering confiscation and should not be denied that right, even during such a test as six months. It relies on Oklahoma Natural Gas Company v. Russell, 261 U. S. 290. In that case a public utility corporation sought an injunction to prevent the enforcement of an alleged confiscatory rate, pending an appeal from the court of first instance in Oklahoma to the state Supreme Court, in a

proceeding in which both the court of first instance and the Supreme Court were exercising the legislative function of fixing rates. The complaint was that plaintiffs were suffering daily from confiscation under the rate to which they were limited by the state commission, and that even if the state Supreme Court changed the rate thereafter on appeal they would have no adequate remedy for their losses before the court acted. They had applied to the Supreme Court for a supersedeas, but it had been denied. This Court held that comity must give way to constitutional right, and that the Gas Company was entitled to a hearing on its application for an injunction without awaiting the action of the state court. In the case of Prentis v. The Atlantic Coast Line Company, 211 U. S. 210, 231, on the other hand, a state commission of Virginia fixed rates for a railway and an appeal was taken under the statute to the Supreme Court of the State which had power legislatively to fix or change rates. A bill was filed by the Railway to restrain the rates fixed by the Commission before the appeal had been perfected and passed on. The company had made no effort to secure a revision and there had been no present invasion of its rights under the order of the state commission but only the taking of preliminary steps toward cutting the rates down. So this Court directed the bill in that case to be retained until the result of the appeal to the Supreme Court if the company saw fit to take it.

"The present case differs from the cases cited, in that when the Water Company applied to the Corporation Commission for an order increasing rates, it was bound by the terms of a contract with the city contained in its franchise, to furnish water at a low schedule of rates fixed therein. It was not entitled to any judicial relief from this situation, however inadequate the rates. Columbus Railway Company v. Columbus, 249 U. S. 399; Public Service Company v. St. Cloud, 265 U. S. 352. Only by securing the waiver of the franchise rates by order of the Corporation Commission speaking for the

State, did the Water Company have any standing to ask for a fixing of rates in excess of the franchise rates. Trenton v. New Jersey, 262 U. S. 182. It was, therefore, plainly within the power and discretion of the Commission after granting partial relief to delay further action in the same proceeding until it could satisfy itself by actual trial to what extent its waiver should go. No constitutional rights of the Water Company to be protected against confiscation would be infringed by such reasonable delay.

"We concur with the District Court in the view that the Water Company should have applied for a resumption of the hearing after the test and exhausted its remedy there before a resort to this suit. Affirmed."

The differences between the Henderson Water Co. case and the case at bar are these: (a) In the Henderson case there was a test period of six months which had, apparently, proven the rate inadequate before suit was brought; while in the case at bar there was no test whatever, the prescribed rate never having gone into effect at all. Moreover, in the case at bar, if the prescribed rate had been put into effect, the Duluth Street Railway Company could have obtained an increase at any time *either more or less than six months thereafter* upon showing that the prescribed rate was proving to be inadequate. See section 8, chapter 278, Session Laws of Minnesota 1921. (b) In the case at bar the Duluth Street Railway Company had expressly agreed, for a valuable consideration (R. 137 to 141) to abide by the terms of said state law. In the Henderson case no such agreement appears.

There being no federal constitutional right either infringed or available to the Duluth Street Railway Company, and no illegal confiscation of its property existing, continuing or threatened, *at the time this action was brought*, July 18th, 1922 (R. 1), the United States District Court for the District

of Minnesota was without jurisdiction in the premises. This suit was not merely premature and capable of being held in abeyance like the case of Prentis v. Atlantic Coast Line Railway Co., 211 U. S. 210; but like the Henderson Water Company case, supra, this case was so premature that jurisdiction did not exist at all on the date this suit was commenced. For the jurisdiction of the federal court, in the absence of any diversity of citizenship, *depended entirely upon the infringement of rights of the Duluth Street Railway Company protected by the constitution of the United States.* Of such there was none.

II.

The statute here involved, sometimes called the Brooks-Coleman Act (Chapter 278 Session Laws Minnesota 1921), when accepted by the Duluth Street Railway Company, became a contract between the State of Minnesota and the company; and each party thereto is bound by all the terms thereof. 26 Corpus Juris 1022.

In Hagerla v. Mississippi River Power Co., 202 Fed. 776, the court had before it an act of congress granting to the water company "rights to construct and maintain a dam across the Mississippi River" which had been accepted by the company. Of this the court said, at page 784:

> "The statute as a whole, with the acceptance by the company, makes a contract."

This rule is universal, and requires no further citation of authority to support it.

The only matter which need be here discussed is the question whether the provisions of section 10 of the state act, providing for review and correction of errors of the commission "by the district court of the county in which the city affected"

thereby is situated—in this case, the district court of St. Louis County, Minnesota,—is valid and binding on the Duluth Street Railway Company. The trial court refused to pass upon this question (Duluth Street Railway Company v. Railroad and Warehouse Commission, 4 Fed. 2nd Series, 343, 346), having previously reached the conclusion that this action was not prematurely brought. That the trial court erred in that conclusion is clear from the later decision of this court in Henderson Water Company v. Corporation Commission, 269 U. S. 278, supra. The trial court also erred in its conclusion that section 10 of the state act, in order to be held valid, must be construed as limiting the powers of the state district court to a *purely* judicial review of the orders of the railroad and warehouse commission; for the supreme court of Minnesota subsequently held (City of Duluth v. Railroad and Warehouse Commission, 209 N. W. Rep. 10) that, under the Minnesota constitution:

> "Courts also go to the aid of the other departments of government, and when so doing the line of demarcation may not be well defined."

In that case, however, the Minnesota supreme court refused to decide whether the jurisdiction of the state court under section 10 of the Brooks-Coleman Act is exclusive, but did say:

> "We are not concerned with the effect the federal courts will give to rates fixed *and reviewed* as provided in the Brooks-Coleman Act."

In that case, the supreme court of Minnesota also refused to decide whether the act as accepted by the company constitutes a contract, saying:

> "That proposition is not in the case."

But in deciding that the act did not impose legislative or administrative duties on the courts in violation of the state constitution, the supreme court of Minnesota said:

> "As already stated, section 10 does not in words require the court to fix the rate, but to affirm, modify, or reverse any order or finding of such commission as may be required by law. If the rate be found confiscatory, the court can neither fix a new rate nor modify the one under review. Its findings as to existing facts which were litigated on the appeal are binding on the commission, *and the matter goes back to the commission, to put into effect orders or findings which conform to the action of the court.*"

We submit that the procedure indicated in that part of the Minnesota supreme court decision last above quoted is very different from a federal injunction permanently enjoining the state commission from putting into effect less than a six cent fare—as was done in the case at bar. Orderly procedure, good faith on the part of the Duluth Street Railway Company, and the obligations of its contract with the people in accepting and claiming the benefits of the Minnesota statute, all imperatively require that *at the very least* the findings of the state district court of St. Louis county, Minnesota, in conformity with the decision last above quoted, shall be made and returned to the commission and put into effect (or reasonable time therefor allowed) before any resort by the company to the strong arm of injunction from the federal courts blocking such review by the said state district court. For, of course, the state court cannot review facts where it appears *in advance* that its conclusions on such review of facts must either correspond with a federal injunction or precipitate a straight clash with federal authority.

The gravamen of the Duluth Street Railway Company's complaint in the federal court in this action is that the commission erred in its valuation of the street railway property (R. 4 to 7), *which by the terms of the Brooks-Coleman Act*

could be reviewed and corrected only by the state district court of St. Louis county, Minnesota, and by that court certified back to the commission. Yet the federal court below effectually prevented such re-valuation by said state court through said federal court's assumption of jurisdiction and issuance of a restraining order immediately when the complaint herein was filed on July 18, 1922, only five days after the commission's valuation and fare order was made and thirteen days before it was to become effective (R. 26, second). This was followed by a temporary injunction, and while that remained in force, the federal court through its special master re-valued the street railway property completely, determined that not less than a six cent fare would yield the proper return on said federal valuation, and issued a permanent injunction accordingly. Thus the state district court of St. Louis county, Minnesota, was deprived of its jurisdiction in the premises; and thus the street railway company was enabled with impunity to breach its agreement with the legislature and people of Minnesota to the effect that said state district court alone should determine the value of said street railway property in so far as necessary to correct any valuation errors of the commission. There is no escape from this conclusion unless it be held that both the state and the federal court might have proceeded simultaneously; and if so, which court would have prevailed when they disagreed?

The interpretation of the statute so as to bar the Duluth Street Railway Company from injunctional suit in the federal courts *at least until after the state courts have acted*, or even permanently, will not deprive the company of any rights guaranteed by the constitution of the United States; nor deprive the federal courts of any jurisdiction whatsoever.

Without any contract or consent of the company to abide by the terms of the act, the legislature had power to limit the right of review of any order of the commission involving the Duluth Street Railway Company to the state district court of St. Louis county, Minnesota, subject to appeal therefrom to the state supreme court. This court expressly so held in the case of Hall v. Geiger-Jones Co., 242 U. S. 539, which sustained the constitutionality of the Ohio Blue Sky Law limiting appeal and review of the orders of the blue sky commission to the common pleas court of Franklin county, Ohio—the county wherein the state capitol is situated. In the syllabus to the decision, this court said:

> "The fact that the statute designates a particular court to review the executive findings does not affect its validity."

Likewise, the provisions of the statute in the case at bar for review of orders of the commission only by a certain designated state district court are valid and binding without the consent of the street railway company and even if it be conceded (which it is not) that federal constitutional rights are involved. In John v. Paullin, 231 U. S. 583, this court said:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

Furthermore, if it were conceded (which it is not) that federal constitutional rights of the Duluth Street Railway Company were involved, the requirement of said state law (ch. 278 Laws Minnesota 1921) that the company in accepting it agree

to waive review of the orders of the railroad commission by any court except the state district court of St. Louis county, Minnesota (subject to appeal therefrom to the state supreme court), would not invalidate the law. This appears from the decision of this court in Central Union Telephone Co. v. City of Edwardsville, 269 U. S. 190. In other words, if there are any provisions of a state statute under which constitutional questions, both state and federal, may reach the state supreme court (being, of course, appealable from there to the U. S. Supreme Court if federal constitutional rights are denied), that is sufficient under the decisions just cited. And there are such provisions in section 10 of chapter 278 Laws Minnesota 1921, which the Duluth Street Railway Company voluntarily accepted and agreed, for a valuable consideration (R. 137 to 139), to abide by. Why should this court aid the company in evading its bargain and breaking faith with the people of Minnesota, whose legislative act it accepted?

There is here involved no limitation of federal court jurisdiction imposed as a condition to the enjoyment of rights offered by the state, such as was attempted by the states and condemned by this court in the foreign corporation cases. Here there never was any federal jurisdiction prior to the enactment of the Brooks-Coleman law (ch. 278 Laws of Minnesota 1921), because all the parties to this action were citizens of Minnesota and bound by a franchise or contract calling for a five cent fare (R. 17), which was converted into an indeterminate permit (with fare to be determined by the railroad commission) through the enactment of said Brooks-Coleman law and its acceptance by the company. The Brooks-Coleman act could not have conferred jurisdiction on the federal courts even if it had expressly attempted to do so; but instead it very clearly limited court action to the local state district court and

the state supreme court where other citizens of this state, similarly situated, have their disputes adjudicated. To this reasonable requirement the Duluth Street Railway Company assented in order to rid itself of a five cent fare, enforceable by contract until the year 1931 (R. 132). The company should be compelled to live up to its bargain. If it has any federal constitutional rights in the premises which are denied to it, the same can be brought to this court via the state supreme court.

III.

It may transpire that prior to the decision of this case the Minnesota railroad and warehouse commission, acting upon a valuation of the Duluth Street Railway Company's property revised to date and upon other evidence, will have fixed a fare in excess of the six cent fare required by the federal injunction in this suit. If so, that fact will not make this case moot. The jurisdiction of the federal court, or its right to proceed in advance of action by the state court in accordance with the Brooks-Coleman Act, will be a recurring question as long as said chapter 278 Laws Minnesota 1921 remains in force. Moreover, at any future time some revolutionary invention (such as the Diesel engine), or other changing factor, may reduce the cost of operations of street railways to such extent as to justify the commission in fixing less than a six cent fare. But it cannot do so, if the present permanent injunction of the United States District Court for the District of Minnesota remains in force—at least not until it has first appeared before said federal court and proven its right to a modification of said federal injunction so as to permit it to function as the state law requires. In such circumstances this case is not moot. Public good requires a decision of the points raised by this ap-

peal. See United States v. Workingmen's Council, 54 Fed. 994; Patterson v. Barber Asphalt Paving Co., 94 Minn. 39; State v. Mpls. & St. L. R. R. Co., 115 Minn. 116, 122.

SUMMARY.

To escape the burdens of a 5 cent fare enforceable by franchise contract until the year 1931, the Duluth Street Railway Company surrendered its franchise and accepted an indeterminate permit offered in lieu thereof by the legislature of Minnesota under and subject to all the terms and conditions set forth in chapter 278 Session Laws of Minnesota for 1921, known as the Brooks-Coleman Act. Said act provides for valuation of the street railway property, determination of a proper rate of return thereon, and fixing of a fare to yield such return, by the railroad and warehouse commission of Minnesota subject from time to time and at any time to modification by said commission itself whenever any change shall appear to be proper. Said act further provides for a review and correction of the commission's order in the premises, including a complete re-valuation of the street railway company's property and a complete re-trial and re-determination of all existing facts relevant to the fixing of a proper fare to be charged by the company, on appeal from any such order of the commission to the state district court of St. Louis county, Minnesota, *and no other court*. Said state district court is empowered to suspend any order of the commission pending the trial and determination of any such appeal; an immediate trial of such appeal may be had; and from such state district court, appeal lies further to the supreme court of Minnesota—and, of course, from there to the Supreme Court of the United States upon denial of any right asserted under the Constitution of the United States.

Said Brooks-Coleman Act, voluntarily accepted by the Duluth Street Railway Company, further provides that the franchise rate (a five cent fare) shall remain in force until a different fare shall have been substituted therefor pursuant to the provisions of said legislative act.

Proceedings were duly instituted by the Duluth Street Railway Company under said Brooks-Coleman Act, and pursuant thereto the Minnesota railroad and warehouse commission issued its order of July 13th, 1922, finding the value of the property of the Duluth Street Railway Company, fixing the rate of return thereon, and prescribing a fare to be charged commencing August 1st, 1922. The fare so prescribed was more than the five-cent franchise fare then in force (i. e. six cents cash with five tokens for twenty-five cents) but less than the company claimed.

Without any appeal to the state district court of St. Louis county, Minnesota, and before the higher fare prescribed by the commission was to become effective, the Duluth Street Railway Company on July 18th, 1922, filed its bill of complaint in this action in equity in the United States District Court for the District of Minnesota alleging that the commission had erred in its valuation and in prescribing the fare to be charged; and that the order of the commission did, or would, deprive the company of its rights guaranteed by section 10 of Article I of the Constitution of the United States and section 1 of Article XIV of the Amendments of the Constitution of the United States. There was no diversity of citizenship, and no other basis for the jurisdiction of said federal court.

But said federal court assumed jurisdiction; issued its restraining order immediately upon filing of said bill of complaint and thereby restrained the attorney general of Minnesota and the railroad and warehouse commission of Minnesota from preventing the Duluth Street Railway Company from

charging a six cent fare; thereafter said court issued a temporary injunction superseding said restraining order and of the same tenor and effect; said court then overruled the defendant's motions to dismiss and objections to the jurisdiction of the court and the propriety of exercising such jurisdiction if any existed, held a trial, revalued the property of the Duluth Street Railway Company; and then made the above described temporary injunction permanent.

The state district court of St. Louis county, Minnesota, never had any chance to exercise its jurisdiction or otherwise proceed in the premises; and could not have done so unless it had proceeded simultaneously with the federal court and without the right to render any independent judgment in conflict with the restraining orders and injunctions continuously kept in force by said federal court. The fare prescribed by the Minnesota commission was enjoined; the franchise fare of five cents, which by the express terms of the state law was to remain in force until the commission's fare became effective, was also enjoined; and a six cent fare, fixed by the federal court, was put into effect through the process of federal injunction.

The defendants as officers of the State of Minnesota, through whom alone the state can act, have brought here this appeal asking for the protection of their rights and the rights of the state; for the liberty of enforcing the contract made by the Duluth Street Railway Company with the legislature and the people of Minnesota when that company accepted the Brooks-Coleman Act; for the right to enforce said legislative act, and particularly the provisions of section 10 thereof restricting review and correction of the state commission's orders here involved to the state district court of St. Louis county, Minnesota (subject to appeal to the state supreme court), as reasonable and proper in itself and as an orderly procedure for

the determination of disputes between a Minnesota corporation (the Duluth Street Railway Company) and the citizens of Minnesota whom it serves wholly in St. Louis county, Minnesota.

To that end these defendants ask that, for the reasons and upon the authorities set forth in this brief, the judgment and decree here appealed from be reversed; that the permanent injunction issued by the lower court be dissolved; and that said court be directed to dismiss the bill of complaint herein for want of jurisdiction of the court, or if that be denied, then for want of equity and because this action was prematurely brought.

Respectfully submitted,

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APPENDIX.

CHAPTER 278, SESSION LAWS OF MINNESOTA FOR 1921.
(The "Brooks-Coleman Act")

"An act relating to street railways."

Be it enacted by the Legislature of the State of Minnesota:

Section 1. *Definitions.*—The term "Commission" as used in this Act shall mean the Railroad and Warehouse Commission of this State; the term "city" as used in this Act shall mean city or village within this State; the term "street railway" and "street railways" shall mean and apply to any association or corporation, leasing, holding, owning, managing, operating or otherwise controlling any street railway line or street railway property wholly or partly within this State; the term "Council" shall mean any board or body, whether composed of one or more branches, who are authorized to make ordinances for the government of a city within this State; and the term "indeterminate permit" as used in this Act shall mean and embrace every grant to any street railway to own, operate, manage or control any street railway property within the state for the transportation of passengers for hire. The phrase "street railway property" whenever used in this Act shall include and mean the property of any street railway as an operating system which is used, useful and reasonably necessary for street railway purposes.

Sec. 2. *Franchises to be "indeterminate permits"—Terms not affected except as provided.*—Every grant that has been heretofore, or that shall be hereafter, made to a street railway

by the state or any city shall become and it shall thereafter be, an indeterminate permit, upon such street railway executing and filing with the clerk of the city in which said street railway is located, a written declaration that it desires that such grant shall become an indeterminate permit and consent that the terms of this Act shall apply to and govern the ownership, control, management, maintenance and operation of the street railway property of said street railway. Upon such street railway filing such declaration and consent, the city clerk shall issue to such street railway a certificate that such declaration and consent has been filed in his office. When such certificate shall be filed with the Secretary of State such grant subject to the provisions of this Act shall become an indeterminate permit to own, operate, manage and control any street railway property, or any part thereof, within such city under the terms and conditions of the grant that shall have been theretofore made by the state or any such city and be then in force; but all of the terms, conditions and obligations of such existing grant, except as herein otherwise specifically provided, shall continue in force so long as such indeterminate permit shall continue. Such indeterminate permit shall continue in full force unless and until the city shall acquire the street railway property of such street railway within the limits of such city, or unless terminated or modified by the Legislature of the State of Minnesota as hereinafter provided.

Sec. 3. *Cities may acquire street railways—Procedure.*—Any city shall have the power and authority to acquire the street railway property of any street railway within such city as in this section provided and not otherwise: (a) by eminent domain according to the procedure provided by Chapter 41, General Statutes of Minnesota for 1913, and amendments thereto; or (b) by purchase by agreement between the city and

the street railway at a value fixed by such agreement; or *(c)* by purchase at the fair value of such street railway property as determined and fixed by the Commission upon hearing upon petition by the city and subject to appeal to the district court, all as herein provided; and every street railway within the the State is hereby required to sell its street railway property to any such city in which the same is located, at such fair value when and as so fixed by the Commission or by the Court upon appeal.

No value shall be allowed in any case for any franchise and no allowance shall be made for damages because of the severance of the properties from connecting properties, but the same shall be valued as an operating system.

Any city which may acquire street railway property may own, operate, lease or resell or otherwise dispose of such property. In no case, however, shall any acquirement of street railway property by purchase or by eminent domain or otherwise, or any agreement or action or proceeding therefor have any force or effect or be binding in any way upon any such city unless and until such acquirement shall, after the fair value of such street railway property has been fixed as provided by this Act, be ratified and approved by a majority of the votes of the electors of such city, cast upon the question at a general or regular city election, or a special election for that purpose, at which such question shall have been submitted as herein provided. As soon as may be after the fair value of such street railway property within any city has been finally determined and fixed by any proceeding or by agreement as provided by this act, the Council of such city shall by resolution submit the question of such acquirement by purchase or by eminent domain, as the case may be, to the electors of such city, fixing the time of such election which shall be not less

than three months nor more than six months after the passage of such resolution, and providing for due notice thereof, stating the question to be voted upon and providing for the holding of such election. Provided that no special election shall be ordered to occur or be held for such purpose within any three months' period immediately preceding or immediately succeeding any general or regular city election.

Sec. 4. *City councils to have power to grant franchises.*— The exclusive right and authority is vested in the council of any city in this state to grant a license, permit or franchise for the construction, maintenance and operation of street railway property within the limits of such city and on such terms and conditions as it may impose. Such council shall have the exclusive right and authority to designate the street or streets upon which any street railway property or part thereof may be hereafter constructed and no street railway property shall be hereafter constructed upon any street in any city without express authority from the council of such city. Such council shall have authority by ordinance or resolution to require the construction of any new line or lines and the extension or change or removal of any existing line or lines. The council shall have authority to prescribe reasonable requirements, standards and conditions of service and operation of any street railway property by any street railway within such city, and shall have the right at all times and in all respects to exercise reasonable control over such service and operation and all things pertaining thereto, including type of cars, the right to fix and amend service schedules, to control stops, routes, headway, speed and number of cars, and to make regulations governing their lighting, heating and their sanitary condition, and such street railway shall furnish the council such information relating to such matters as it may from time to time require

and shall operate at all times at least a sufficient number of cars to and shall fully comply with all schedules and routes required by the council, and adequately accommodate the traveling public, and in these and all other respects furnish reasonable and adequate service and facilities for the accommodation of the traveling public. All cars used shall be of modern design and equipped and furnished with such improvements and appliances as to assure the health, safety, comfort and convenience of the passengers, the public and the company's employes. They shall at least equal in quality, style and design cars now operated in such city. The company's roadbed and tracks shall be maintained at all times in first class operating condition so as to afford convenient and comfortable travel thereon. The location of shops, car barns, waiting rooms and terminals and all other matters hereinbefore in this section specified shall be subject to the approval of the Council. The action of the Council of any city under this section shall be final and not subject to appeal by the street railway, except as specifically otherwise provided by this section.

Any order, resolution, rule or regulation or requirement of any kind made or imposed upon the street railway by the Council as provided by this Act may be enforced by mandamus, injunction or other appropriate proceeding.

Sec. 5. *Railroad and Warehouse Commission to fix rates.*— The Commission is hereby granted initial and exclusive power and authority upon hearing upon petition as provided by this Act, to fix and establish rates of fare and charges by a street railway for carrying passengers, subject to the powers of the district court in case of appeal thereto as hereinafter provided, which rates shall not yield to exceed a reasonable return on

the fair value of the street railway property of any street railway.

Sec. 6. *Rates must be fair—Transfers.*—Rates of fare and charges within any city shall be just, fair and reasonable and shall be sufficient to yield only a reasonable return on a fair value of the street railway property of the street railway within such city. The same fare shall be charged each passenger for transportation over all street railway lines in any city from any one point to any other point therein and transfers and retransfers shall be given to each passenger free of charge, good for use for his continuous trip on all other lines in the city under such rules and regulations as the Commission may prescribe. In all cases where cities are contiguous inter-city passenger service shall be provided without change of cars by a street railway operating in both cities. If a different street railway is operating in one such city from the street railway that is operating in the other city, the inter-city transportation as above provided shall be furnished nevertheless by both street railways and mutual adjustment of fares and expenses shall be made by such railways, subject to control and regulation thereof by the Commission, authority for which is hereby granted to the Commission. The fare charged for transportation within either city on the portion of such interurban line located within that city shall not exceed the fare on other lines within such city with like transfers and re-transfers as hereinbefore provided. The costs and expenses incurred and paid by the street railway in performing its obligations shall be reasonable.

Sec. 7. *Companies may issue bonds, stocks, etc., on permit from commission.*—Any street railway authorized to do business under the laws of this state may issue stocks, bonds, notes

and other evidences of indebtedness payable at periods of more than twelve months after the dates thereof, whenever necessary for the acquisition of property, the construction, extension or improving of facilities or for the discharge or lawful refunding of obligations; provided, however, that except as herein otherwise provided before the street railway shall issue any such stocks, bonds, notes or other evidences of indebtedness as aforesaid, it shall secure from the Commission after a full hearing and investigation before and by such commission an order authorizing such issue and fixing the amount thereof. The city shall be a necessary party to such hearing. Such order shall only be issued when the Commission shall be satisfied that the funds derived from such issue are essential for carrying out such purposes, and that it is proper and reasonable under all the circumstances to make such issue; provided that it shall be the duty of the Commission to authorize an issuance of such bonds, notes or other evidences of indebtedness as may be required for the construction of any new line or lines, or the extension or change of any existing line or lines, or any construction or improvement in facilities, any of which shall have been ordered, required or approved by the council as provided by this act, subject, however, to the right of appeal to the district court of the county wherein such city is located from any such order or requirement upon the same terms and conditions as provided by this act in case of other appeals. Any order of the Commission made hereunder, shall contain a finding by the Commission that the use of the capital or property to be secured by issue of such stocks, bonds, notes or other evidences of indebtedness is reasonably required for the purposes of such street railway and that such issue is reasonable and proper under all the circumstances. Provided, further, however, that any street railway may issue notes for law-

ful purposes payable at periods of not more than twelve months without authority from said Commission, and no such notes or any part thereof shall be refunded by any issue of stocks, or bonds or any evidences of indebtedness running for more than twelve months without the consent of the Commission. The Commission shall not permit the issue of and the street railway shall not issue, any notes, bonds or other evidence of indebtedness when the aggregate par value thereof, together with all other like evidences of indebtedness that shall then be outstanding, shall exceed 85% of the fair, reasonable value of the property of the street railway.

Sec. 8. *Street railways to make application to fix rates.*—Any street railway or city may apply to the commission at any time to fix and establish hereunder rates of fare to be charged by such street railway for the carrying of passengers within such city and it shall be the duty of the Commission upon application being made by petition as provided by this act to proceed with due diligence to examine and appraise the street railway property and to hear evidence submitted on behalf of the street railway or the city, and to fix and determine the fair value of such street railway property within such city and to fix and establish rates of fare to be charged by such street railway for carrying passengers within such city under and in accordance with the terms and requirements of this act, which rates established shall yield to the street railway a reasonable return on the fair value of its street railway property within such city as an operating system. In establishing any rate of fare the Commission or the court upon appeal shall consider the fair value of the street railway property of the street railway within such city as an operating system, but no additional value shall be allowed for any franchise of the street railway. The rates which the street railway is author-

ized to charge and collect under existing franchises shall be and remain the authorized and lawful charge until a rate is fixed by the Commission under the provisions of this Act; provided, however, that the Commission may on application of either any city or street railway establish after notice and hearing, an emergency or temporary rate pending a valuation of property and the establishment of a rate based thereon; provided that no such rate shall continue in force or effect for a longer period than is reasonably necessary to make a valuation of the property and establish a rate based thereon. The Commission may at any time after notice and hearing change or cancel any such emergency rate. Thereafter the Commission may on its own initiative and shall upon the application of the city or the street railway from time to time make such investigation as to any change in property value or cost of service as may be reasonably necessary and after a full hearing as herein provided make such order confirming existing rates or changing rates as may be just, to properly regulate rates of fare hereunder. The Commission or council shall have the right at all times to inspect by itself or by its representatives all the books, records and accounts and street railway property of any street railway in any city.

Sec. 9. *Proceedings commenced by filing petition—Hearing.*—All proceedings before the Commission shall be commenced by filing with the Commission a petition in writing in such form as the Commission may prescribe briefly setting forth in addition to such other matters as the Commission may by rule or order provide, the matter or matters upon which hearing is desired and requesting a hearing thereon. Any city or street railway affected by any such proceeding shall be a necessary party thereto. Upon the filing of any such petition as aforesaid, the Commission shall fix a place and time for

such hearing not less than thirty days after the filing of such petition and shall forthwith give notice of the time and place of such hearing to all interested parties and serve or cause to be served upon each such party a copy of such petition, provided that continuances from time to time shall be granted to either party as the necessities of the case may require; and the city shall have reasonably ample time before the conclusion of any such hearing to make all necessary valuations and adequately prepare its case, as herein provided.

At the time and place so set for said hearing unless continued for cause the Commission shall proceed to hear and determine the matter or matters set forth in such petition. If the petition be to fix the value of street railway property for purchase by the city as provided by this act, the Commission shall after such hearing determine and fix the fair value of the street railway property of any such street railway within the city. If the petition be to fix a rate of fare, the Commission shall after hearing as herein provided fix a rate of fare to be charged by the street railway which will yield only a reasonable return on the fair value of the street railway property of such street railway within the city, as provided by this act.

Whenever any proceeding is instituted before the Commission or Court on appeal, either for rate-making purposes or purchase of the street railway property and before the same is heard, the Council shall examine and appraise, or cause to be examined and appraised, the street railway property of the street railway involved and shall employ and procure the services of a person or persons of known and recognized experience and qualifications in street railway appraisals and rate-making, to appraise such street railway property, investigate the books, accounts and records of such street railway and inform himself as to its operating conditions and expenses, and

otherwise fully prepare himself and the city to present to the Commisson or the Court all the facts material to the issue before the Commission or Court; and the Council shall employ such other qualified accountants, engineers and others to assist in the preparation of the city's case before the Commission or the court on appeal, as the Council deems advisable.

All the expenses and disbursements of the city in any such proceeding, either before the Commission or court on appeal shall be borne by the street railway company as an operating expense, and shall be paid by the street railway to the city upon presentation to the street railway of vouchers showing the same has been paid or incurred by the city; provided the amount of expenses and disbursements to be so paid shall not exceed in any one year an amount equal to One Hundred and Fifty Dollars per 1000 of population of any such city and the necessary expense incurred by the Commission in such proceedings shall also be paid by the street railway company and treated as an operating expense.

Sec. 10. *Appeals.*—Any city or street railway may appeal from any order, ruling or decision of the Commission duly made after hearing to the District Court of the county in which the city affected by any such order, ruling or decision is located, and said appeal shall be taken and all proceedings thereunder had as provided for by Sections 4191 to 4199, both inclusive, General Statutes of Minnesota for 1913, so far as the same may be applicable. Upon such appeal the matters involved therein shall be tried and determined by the court without a jury, in the same manner as though originally commenced therein, provided that the findings and order of the Commission shall be received in evidence upon such trial, but the Court shall in no event be bound thereby. In case of an appeal involving the value of the property for the purpose of

purchase by the city, such appeal shall be heard by three (3) judges, and if there are less than three judges in such district, then the Governor shall designate one or more district judges to sit upon any such case so that the same may be determined by such judges as aforesaid. Upon any appeal the District Court shall have jurisdiction of and shall try the whole matter in controversy, including matters of fact as well as law, and make findings upon all material facts, and in any case involving rates or the value of street railway property shall find and determine the fair value of such property and also what is a reasonable rate of return thereon, and shall affirm, modify or reverse any order or finding of such commission as may be required by law. The judgment or any order of such court shall be certified to said commission and the commission shall thereupon modify, reverse or put into effect its order or findings so as to conform to the judgment, order and findings of such court. Any party to an appeal or other proceeding in the District Court under this act may appeal from the final judgment or from any final order therein in the same cases and manner as in civil actions. The appeal may be filed in the Supreme Court during any term thereof and shall be immediately entered upon the calendar and heard upon such notice as the court may prescribe, as provided for by Section 4200, General Statutes of Minnesota for 1913, as far as the same may be applicable.

Sec. 11. *Reservations by city.*—The city hereby reserves the right to authorize any existing or future suburban railway company to jointly use tracks, poles, wires, appliances, power and electric current of said street railway, as now existing or hereafter constructed. Such use shall be subject to such rules and regulations, routing and schedules as may be fixed by mutual agreement between said street railway and such suburban railway company, subject to the approval of the

Council. If the parties cannot agree as to said rules of operation, routing and schedules, the same shall be determined by the Council.

The compensation to be paid the street railway by such suburban companies for said joint use shall, if possible, be fixed by mutual agreement between the street railway and the suburban company, subject to the approval of the Council. If they are unable to agree upon such compensation the same shall be fixed and determined in the first instance by the Council subject to appeal to the District Court of the county in which such city is located as in case of other appeals provided for in this Act.

Such compensation shall in all cases be just, fair and reasonable compensation for the facilities furnished, representing a sum not less than the reasonable value of the power furnished by the company and a fair share of the cost of maintenance of the tracks and equipment, taking into account the advantages and disadvantages of the entry of said line into the city.

The city expressly reserves the right by ordinance at all times to regulate and control the carrying of freight and express and the operation of freight and express cars by suburban lines over the tracks of the company.

Sec. 12. *Franchise not to be issued without certificate from commission.*—No license, permit or franchise to operate a street railway in any city where a street railway is then operating shall be granted by the Council of any such city unless a certificate of convenience and necessity is first obtained from the Commission after a hearing held thereon.

Sec. 13. *Commission to investigate, prescribe system of accounting, etc.*—The Commission shall have authority, upon its own motion, to make investigation, prescribe uniform systems of accounting, and prescribe depreciation, written notice of

which shall forthwith be given the city with the right in such city to appeal to the Distri Court as provided by this Act in other cases of appeal, and shall have authority to control the disposition and use of any moneys in the depreciation fund, and to do or perform any act which may in its opinion be necessary or expedient to carry out the provisions of this Act. The street railway shall furnish and file with such Commission annually, accurate and full reports and information of its income and expenditures (in such form as the Commission shall require) and the Commission may require the street railway to make and file with it, any and all other reports, financial or otherwise, that it may deem necessary.

Sec. 14. *Rights reserved—Permit may be granted to Minnesota corporations only.*—The state reserves the right at any future time to modify, amend or repeal this Act or any part thereof, or to cancel or modify any indeterminate permit arising or existing under this Act, or any grant, permit or franchise heretofore or hereafter granted by the State or any city, or otherwise, and nothing in this Act contained shall limit the police power of the State. The street railway shall be subject to all the duties, restrictions or liabilities now or hereafter contained in the General Laws of the state. Notwithstanding anything in this Act to the contrary, an indeterminate permit shall be granted only to a Minnesota corporation, and any assignment, or transfer thereof, shall be to a Minnesota corporation. No such street railway shall be entitled to any damages or compensation in the event of any modification, amendment or repeal of this Act or the cancellation or modification, of any permit, grant or franchise above referred to.

Sec. 15. *Conflicting acts repealed.*—All Acts or parts of Acts conflicting with the provisions of this Act are hereby repealed in so far as they are inconsistent therewith.

Sec. 16. This Act shall take effect and be in force from and after its passage.

Approved April 14, 1924.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 770.

THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, O. P. B. JACOBSON, ET AL, AND CITY OF DULUTH,
Appellants,

vs.

THE DULUTH STREET RAILWAY COMPANY,
Respondent.

(Appeal from the Decree of the District Court of the United States for the District of Minnesota.)
31493

BRIEF FOR THE CITY OF DULUTH

STATEMENT OF CASE

This is an appeal by the City of Duluth, Minnesota, from a decree of the District Court of the United States for District of Minnesota, entered January 24th, 1925. It was allowed prior to

taking effect of the Act of Congress of February 13th, 1925. (Record p. 736, fol. 965).

The decree enjoined the schedule of rates to be charged in the City of Duluth by the Duluth Street Railway Company as fixed by the Railroad and Warehouse Commission of Minnesota by its order of July 13th, 1922. 4 Fed. (2nd) p. 543.

And costs, in the sum of $5,000, part of Master's fees, was adjudicated against the City of Duluth, appellant. That schedule has never taken effect, being barred by temporary restraining order issued July 18th, 1922, followed by interlocutory injunction, and by the decree, after trial before a Master and exceptions by City to Master's findings, (Rec. pp. 725-732).

This appeal also directly involves the validity of approximately $200,000.00 worth of coupon rebate tickets, provided for and issued by the Street Railway Company under amended interlocutory injunction order made August 24, 1922. The provision in the order is as follows:

> "It is hereby ordered, That the said order for interlocutory injunction heretofore made and filed herein on the 31st day of July, 1922, be and the same is hereby amended by addition of the proviso and condition of the words and figures as follows, to-wit: Beginning with midnight of the 7th day of September, 1922, and until further order of this court, provision shall be made by the Duluth Street Railway Company for the sale of five tickets for thirty cents, each ticket good for one ride, and accompanying said tickets a coupon issued under and containing the following terms and provisions, to-wit:
>
> "No. .....
>
> Coupon for 5 cents, payable to bearer, transferable by hand and redeemable by the Duluth Street Railway Company, on presentation, if and when the order of the Railroad and Warehouse Commission of Minnesota, bearing

date July 13, 1922, on final hearing in the case of Duluth Street Railway Company, complainant vs. the Railroad and Warehouse Commission of Minnesota, and its members, and the City of Duluth, defendants, now pending in the U. S. District Court, District of Minnesota, shall be sustained in its allowance of five rides for 25 cents, or in the event that said action shall be dismissed on final decree or on appeal; but if said order of the State Commission in allowing five (5) rides for 25 cents is not so sustained, then this coupon shall be void."

The full order is printed as certified to the clerk of this court at pages 119-120 of Transcript of Record Case No. 696 of October Term of this court for 1922 (File No. 29246). This case between the same parties on appeal from the interlocutory judgment order was displaced by this pending appeal.

At the opening of trial before the Master August 13, 1923, (R. p. 74) the amount of such impounded money was $72,-991.23 (R. 73-74). It continued to accumulate until the decree stopped it (Subdiv. 6 Decree Record p. 734) to-wit: January 24, 1925. At that time it is assumed to have reached at least the sum of $200,000.00.

(A question cannot be considered "moot" which directly involves the present validity of $200,000.00 of coupon rebate tickets held by car riders under orders herein of the Federal Court, dependent on the expressed contingency, viz., "If the action shall be dismissed on final decree, *or an appeal*").

Designation, under paragraph 9 of Rule 11, of Points here made by the City, is found at pp. 742-746 of Printed Record, I. to VIII. inclusive.

In brief they are:

(1) The City's motions to dismiss the Bill for want of equity ought to have been granted; that it was brought

in violation of the respondents' contract with the State and City of Duluth, evidenced by Chapter 278, Laws of Minnesota of 1921, the terms of which were proposed, and accepted and consented to by complainant in writing. Without such consent its terms were not binding on either the City or the Street Railway.

(The Act in question is called "Brooks-Coleman" Act. It is printed in full at end of Brief of Co-appellant, Attorney General of the State of Minnesota, filed herein, and need not here therefore be reprinted).

It is Sections 4816-4830, G. S. 1923.

(2) By its Bill and the injunctions it has deprived the City of Duluth of its clear rights, under section 10 of the contract, to a hearing in the State Court on the City's appeal taken in July, 1922, to the District Court of St. Louis County, Minnesota, from the same order of the Commissioner, viz., of July 13th, 1922. Such appeal is still pending unheard, barred by the injunctions.

(3) That no Federal question exists in the case on the facts; and no proper basis for Federal jurisdiction, because the Brooks-Coleman Act when formally consented to in writing became a "Contract" between the City and Company as to manner of fixing fares.

(4) That, in any case, complainant should have been, and should be required to exhaust its rights given by the Brooks-Coleman Act before the Commission and State Courts, before it should be heard in Federal Court, to raise any alleged Federal questions.

(5) That, in any case, no "clear" case of "confiscation" was shown in the record; for the evidence is persua-

sive that, including annual depreciation, the net return on any fair value would be not less than 11%.

(6) That *final* injunction should not have been decreed, in the absence, here existing, of practical test by experience of the result of the schedule of rates, approved and fixed by an impartial State tribunal, the Railroad and Warehouse Commission of Minnesota; that, in any case, the Bill should have dismissed *"without prejudice"*, for actual test of the schedule.

These questions were raised and argued on motions to the Court, and at trial and on exceptions taken to the Master's findings (Record pp. 725-732); and are herein urged.

Assignments of error covering said points were made and filed. (Original 968; not printed).

The Duluth Street Railway Company, complainant, is a Minnesota corporation. (Petition and Record, p. 1, par. 2). All parties to this controversy were and are Minnesota citizens. It operated under the terms of a franchise granted by special act of the legislature of the State of Minnesota in 1881 (Special Laws, Chap. 200 Ex. Session), formally accepted in writing by the Street Railway Company, and under certain ordinance franchises granted under legislative authority by villages which afterwards were incorporated as part of the City of Duluth, which ordinances were formally accepted by the Street Railway Company, all pleaded in its Bill, (Record, p. 2). The main franchise had operation for fifty years, to expire in 1931. It was by its terms a *"contract"* (Sec. 16 thereof) so determined by the Minnesota Supreme Court, in numerous cases; and in the City of Duluth vs. Duluth Street Railway Company, 137 Minn. 286., the Court says: (p. 294)

> "To this franchise not only plaintiff and defendant, but also the state was, in express terms, a party, and all three are bound by the terms thereof."

The Act was not to take effect *unless acceptance was filed by the company within thirty days after passage of the Act,* (Sec. 16 thereof). This was done.

Said Section is as follows:

Acceptance by the Company.

"Section 16. Within thirty (30) days from the passage of this act, said company will file with the secretary of state of Minnesota, and with the recorder of the village of Duluth, a written acceptance of the grants hereinbefore made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted the same shall operate as a contract between the state and the village and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges and franchises whatever."

(Sec. 16, Chap. 200 Session Laws of Minn. of 1881, Extra Session).

Likewise the Brooks-Coleman Act (Chap. 278 Gen. Laws of Minn. for 1921) was proposed through efforts of certain Street Railway Companies, as a modification of the existing franchises of street railways *when accepted by such street railways of the state as might file a formal written "declaration and consent"* to its terms (Sec. 2 thereof). The Duluth Street Railway Company formally accepted the terms proposed in the Act by filing its written "declaration and consent" thereto on April 28, 1921 (see Petition and Record p. 3, par. 4). The form of the acceptance is shown in full as Exhibit A, attached to the complaint, at pages 13 and 14 of the Record. It says:

"and consents that the terms of said Chapter 278 shall apply to and govern the ownership, control, management,

maintenance and operation of the street railway property of the said Duluth Street Railway Company."

Folio 22, Re d p. 14.

The said Brooks-Coleman Act, thus accepted by it, did not annul or cancel the existing franchise contract of the Duluth Street Railway Company. Its old franchise is still in full force as a contract except only as *expressly modified by the terms of the Act.*

For Section 2 of the Act is as follows:

"Every grant that has been heretofore, or that shall be hereafter, made to a street railway by the state or any city shall become and it shall thereafter be, an indeterminate permit, upon such street railway executing and filing with the clerk of the city in which said street railway is located, a written declaration that it desires that such grant shall become on indeterminate permit and *consent that the terms of this Act shall apply to and govern the ownership control, management, maintenance and operation of the street railway property* of said street railway. Upon such street railway filing such declaration *and consent,* the city clerk shall issue to such street railway a certificate that such declaration and consent has been filed in his office. When such certificate shall be filed with the Secretary of State such grant subject to the provisions of this Act *shall become an indeterminate permit to own, operate, manage* and control any street railway property, or any part thereof, within such city *under the terms and conditions of the grant that shall have been theretofore made by the state or any such city and be then in force; but all of the terms, conditions and obligations of such existing grant, except as herein otherwise specifically provided, shall continue*

in force so long as such indeterminate permit shall continue. Such indeterminate permit shall continue in full force unless and until the city shall acquire the street railway property of such street railway within the limits of such city, or unless terminated or modified by the Legislature of the State of Minnesota as hereinafter provided."

The rate which the Duluth Street Railway had been charging for fares was 5 cents (R. Petition p. 17, par. 14); and the provisions of Section 8 of the Brooks-Coleman Act contained the following provision:

"The rates which the street railway is authorized to charge and collect under the existing franchise shall be and remain the authorized and lawful charge until a rate is fixed by the Commission *under the provisions of this Act* * * * and thereafter the Commission may, on its own initiative, and shall, upon application of the city or street railway, from time to time make such investigation as to any change in property value or cost of service as may be reasonably necessary, and after a full hearing, as herein provided, make such order confirming existing rates or changing rates as may be just to properly regulate rates of fare hereunder."

A manifestly important stipulation of the Act was that any order of the Commission was appealable by either party, city or street railway, to the particular District Court of the county in which the street railway was situated, in this case of St. Louis County, sitting in Duluth (Sec. 10, Chap. 278). The appeal was to be taken and all proceedings thereunder had, *as provided by Sections 4191-4199,* both inclusive, General Statutes of Minnesota for 1913, so far as the same were applicable. These are *Sections 4650-4658, General Statutes 1923.*

See Statutes reprinted at end of this Brief.

Either party could apply to the District Court for an order staying and superseding the order appealed from (Sec. 4651, General Statutes 1923; Sec. 4192, G. S. 1913). Such a stay has been granted on application of City of Duluth as against an earlier order of the Commission affecting the Duluth Street Railway Company, dated August 29th, 1921 (Record p. 48).

As to speed of review:

The appeal must be made *within 30 days* by service on the Secretary of the Commission (Sec. 4191, G. S. 1913, which is Section 4650, G. S. 1923).

The secretary shall *forthwith* file with the Clerk of the District Court to which the appeal is taken a copy of the order and all findings.

Persons serving notice of appeal shall, *within 5 days after* the service, file the same, with proof of service, with the Clerk of the Court to which appeal is taken. (Sec. 4651, G. S. 1923).

Such an appeal "shall take *precedence of all other matters except criminal cases;*" and "shall be tried *summarily* by the court" (Sec. 4655, G. S. 1923).

If appeal is taken from the decision of the District Court to the Supreme Court, it "shall be *immediately* entered on the calendar and heard upon such notice as the Court may prescribe" (Sec. 4659 G. S. 1923; also, same language at the end of Section 10 of the Brooks-Coleman Act).

When the District Court has made its findings, which must cover *"all material facts"*, and, specifically, *"valuation"* and "reasonable rate of return", (which are the dominating facts) (Section 10), it is then provided:

> "The judgment or any order of said court *shall be certified to said Commission,* and the Commission *shall*

thereupon modify, reverse or *put into effect its order or findings so as to conform to* the judgment, order and *findings* of such court."

Thus, the Commission has not discharged its full duties in fixing the fares under the Act, "as provided therein", until it shall have issued its final order conformable to the directions of the Court on appeal taken; and, meanwhile, it is provided that the old franchise rate of five cents shall remain in force and effect until a rate has been "fixed by the Commission under the provisions of this Act" (Section 8) which necessarily means "fixed under *all* the provisions of the act", including any suspension or stay order, and including the delays necessary to its final order.

An order of the Commission fixing the schedule of fares to be charged was made July 13, 1922 (R., p. 26). It *increased* the cash fare from 5 cents to 6 cents; *but provided for sale of tokens giving five rides for 25 cents.*

The City of Duluth appealed from this order to the District Court of St. Louis County, on July 25th, 1922; i. e. *before it became an Intervenor in the pending case* (Par. XIV. of Answer of Railroad & Warehouse Commission, Record p. 36, filed July 29th, 1922; Record p. 27, f. 43) but has never been able to bring its appeal to trial. It was prevented by the Duluth Street Railway from doing so, having become Intervenor herein (Record original p. 53) by reason of the interlocutory injunction issued, which was followed by the final decree (Record, pp. 732, 735) herein appealed from (Record p. 736).

The Duluth Street Railway Company did not appeal from the Commission's order of July 13th, 1922 to the District Court of St. Louis County (Record 141). *Neither did it apply to the said Court for an order staying or superseding the Commission's order,* which it was at liberty to do under the state statute.

Instead, on July 18th, 1922 it filed its bill of complaint in the Federal Court at Minneapolis, Minnesota, alleging confiscation of its property thereby, contrary to Section 10 of Article 1 of the U. S. Constitution, and of Section 1 of Article XIV of its amendments, and obtained a Restraining Order which was followed by a temporary injunction, the effect of which was to *strike out that part of the order which allowed the purchase of five rides for 25 cents,* leaving the rate a flat 6 cent cash fare, as *raised* by the Commission.

Thus, the bill was filed and Restraining Order issued within five days after the filing of the order of the Commission; and *13 days prior to August 1st, 1922, when, by its terms. it was to take effect* (R. p. 26 at end). After trial before Master, and exceptions taken and argued, decree was made *eliminating the provision for sale of tokens for five rides for 25 cents,* and enjoining any fare less than or more than 6 cents *"until further order of the Court,"* or "until reasonable rates of fare should be fixed by the Commission" (Record pp. 733, 734, par. 5).

The injunction itself prevents defendants from interfering with any rate of fare *"not exceeding 6 cents"* (Record 736 at top).

Motion of City of Duluth to dismiss the bill was made (and denied), Record 54, "as not stating a cause of action cognizable in equity"; and specifying that the Brooks-Coleman Act, pleaded in the petition, when accepted by the Duluth Street Railway Company by filing its "declaration and consent" (Exhibit A of the complaint) was a contract so shown on the face of Bill, and mutually binding on the parties plaintiff and defendant to have the issues submitted to the Commission, and to the District and Supreme Courts, as provided in Section 10 of the Act; and to abide by the fare to be so fixed, whether 5 cents or more (F. 77, R. 54).

The City's answer made similar defense (R. 47, 2nd par. XVII). The allegation of the bill (par. 20, R. p. 11) claiming "no adequate remedy at law" was put in issue and denied (Answer par. XIII, p. 44).

Like objection by the city to introducton of evidence by complainant was made at the trial (R. 59, 60, 61); and because "the agreement was * * * ignored and violated by the street railway company in seeking jurisdiction in the Federal Courts, in ignoring and overlooking and failing to take any appeal to the state courts on the order of July 13, 1922" (R. 61).

SPECIFICATIONS OF ERROR

Appellant City of Duluth relies upon the errors assigned at time of allowance of its appeal (Original record pp. 968, et seq. not printed) and on the Points numbered I. to VII. inclusive, set out in the printed record at pages 742-746).

ARGUMENT

It is the contention of the appellant City of Duluth that the decree should be reversed, the injunction set aside and the bill dismissed for lack of Federal jurisdiction, as existing either at the time of the filing of the bill, *or since.*

If not so, then that the principles of comity and convenience require such result, deferring jurisdiction until the Duluth Street Railway Company should have applied for and exhausted its rights under the state statutes of Minnesota, as set out in the Brooks-Coleman Act.

Further, there was failure of proof to show a "clear" case of "confiscation"; and, in any case, the Bill should have been dismissed "without prejudice" in absence of any trial of the schedule of rates fixed.

As necessary result, the City will not be compelled to pay the $5,000, assessed against it as costs, and will be allowed to a hearing on appeal from the Commission's order, as per its contract rights, or from any later order, without erroneous assumption of jurisdiction by a Federal Judge; and about $200,000 of issued coupon rebate tickets will be validated to the holders.

The specific main contentions of appellant, City of Duluth, are three, viz:

(1) That the Federal question of confiscation pleaded by petitioner does not here arise, and is "immaterial"; because all rights here are fixed by contract between the parties as shown on the face of the petitioner's bill. That Federal jurisdiction does not exist.

In Minnesota, street railways are not under compulsory regulation as to rates of fare. It is all matter of contract.

It is submitted that these facts distinguish all the known cases of successful attack, made under claim of confiscation of property upon order of a State Commission fixing rates, whether the Federal jurisdiction has been asserted prior to, or subsequent to the exhaustion of the remedies given by state statutes; and that such fact puts the present case in the class by itself, unlike any other case where Federal jurisdiction has been sustained.

(2) That in any case, fixed principles of comity and convenience required the suspension of the Duluth Street Railway Company's application to the Federal Court until it had applied for relief to the state courts, and commission as provided in the Brooks-Coleman Act; and until it had exhausted its remedies of review and correction therein given.

(3) That, as set out in Point III. (record, page 744) *final injunction by decree* should not have been granted, in view of the record and points IV., V., VI. and VII., (Record, pp. 745, 746), until a practical test by experience had been made for an adequate time of the rates established by the Commission's order; whereas the schedule as ordered was at once enjoined. In other words, that the bill on the facts in evidence should have been dismissed "without prejudice".

I.

THE BROOKS-COLEMAN ACT, WHEN ACCEPTED BY THE DULUTH STREET RAILWAY COMPANY BY FORMAL WRITTEN DECLARATION AND CONSENT TO ABIDE BY ITS TERMS, BECAME, LIKE ITS ORIGINAL FRANCHISE UNDER CHAPTER 200, EXTRA SESSION, 1881, A CONTRACT, MUTUALLY BINDING ON THE PARTIES IN INTEREST THERETO.

City of Duluth vs. Duluth St. Ry. Co., 137 Minn. 286, supra.

Dartmouth College Case.

So as to municipal ordinances, granted under legislative authority.

Public Service Commission vs. St. Cloud, 265 U. S. 352, and numerous cases therein cited.

Georgia Ry. and Power Co. vs. Town of Decatur, 262, U. S. 432 (43 S. C. 613).

Henderson Water Co. vs. Corp. Com. of N. C. 269 U. S. 278.

In City of Duluth vs. R. & Warehouse Commission, 209 N. W. Rep. p. 10 (May, 1926), the Minnesota Supreme Court has

held that the provisions of Sec. 10 of the Brooks-Coleman Act are valid and binding under the Constitution of the State of Minnesota. Under this decision, it necessarily follows that the whole Act, treated as a contract, must be treated as a *valid* contract under the laws of Minnesota; for this court follows the construction put by a State Supreme Court upon the Statutes and Constitution of the State.

This court said in the cited Georgia case:

> "The contract being valid, we are not concerned with the question whether the stipulated rates are confiscatory", citing cases.

It necessarily follows, that such is the rule, where the contract specifies the method of fixing the rates, the times and manner of doing it. Here in case of appeal by either party the *final fixing* cannot be arrived at *"as provided in the Act,"* until the District Court has certified its findings to the Commission. (Sec. 10).

No Federal question exists in such case, and no Federal jurisdiction. Such is submitted to be the case here.

1. There is ample consideration to the Duluth Street Railway Company for its written acceptance of the proposition incorporated and offered to it in the Brooks-Coleman Act.

The two fundamental benefits were (1st), its escape from the limitation of its existing franchise, under Ch. 200, Special Laws, extra Session 1881, which expired in 1931.

By the modification proposed, its rights became an "indeterminate permit" to occupy the city streets, which would continue until the City of Duluth should buy the railroad (Sec. 2), etc. (2nd.) Another extremely important consideration to the Street Railway Company was *the opportunity thereby opened to escape from its fixed limit of a 5-cent fare.* Its hope was to

increase its net revenue by the new method of fare fixing, agreed to; although under the operation of said Act, a fare lower than five cents may accrue, under the terms of the Act, under increased business or changing conditions (Sec. 8).

When examination of the other stipulations of the Act is made, it is seen how thoroughly the contractual element appears throughout. In terms, under section 2 thereof, all the terms of its pre-existing "grant" continue in force, except as "expressly provided" in the Act. Under the existing franchise contract, the City of Duluth had no effective control over extensions of the railway system, nor over its equipment, style of cars or schedules. But by Sec. 4 of the new agreement the City Council was given controlling power over these matters; and it was specifically agreed that the Street Railway Company could take no appeal from the orders of the Council in respect thereto (Section 4, at end). One of the items of agreement was that in determining "value" no account should be taken of the existing franchise held by the company (Sec. 3, 2nd paragraph). Another was that the existing rate of 5 cents should continue until changed, *as provided in the Act* (Sec. 8). Another was that without claim of damages against it, the state, as a party, was entitled to amend, modify or repeal the Act, the effect of which would be to leave the Street Railway Company under the contract limitations existing before the Act was accepted (Sec. 14).

Under all these circumstances, and in view of these stipulations, it would seem futile for the Duluth Street Railway Company to claim that the Brooks-Coleman Act, thus modifying its existing franchise, is not also, as that was (City of Duluth vs. Street Railway, 137 Minn. 286) a contract in the full acceptance of the term, limiting its rights, and granting rights to the adverse party, the City of Duluth. If so, it cannot be allowed to accept the benefits and repudiate its obligations; nor to deny to its adverse party, the City of Duluth, the rights

therein expressly covenanted, one of which was the right to have reviewed by appeal, if taken by the City within thirty days, (as was here done) any order fixing rates made by the Commission; whereas under the facts, it is seen that the rights of the City of Duluth so asserted have been repudiated and blocked by the proceedings here taken by the plaintiff in the Federal Court.

2. Treated as a contract, *it is one solely between citizens of the same state, Minnesota.* Therefore no question here arises growing out of diverse citizenship of the parties. The rule forbidding discrimination against citizens of other states and foreign corporations and attempting to compel, as against the citizens and corporations of other states, the exclusive use of the state courts has, therefore, no application here.

3. Certainly it is competent for the legislature to compel, and for its citizens to contract, that in cases of dispute, the hearing thereof shall be limited to certain places and courts and in respect to amounts, and by other stipulations as to original or appellate jurisdiction and review. It has never been supposed that such laws of the state were open to legitimate criticism as being either illegal or unreasonable. Therefore it is not a subject of successful attack that this contract between citizens of the State of Minnesota provides that if either of the parties should be dissatisfied with the preliminary order of the Commission fixing rates, appeal and review should be had in the District Court of St. Louis County; and in the manner therein specified; and subject to appeal to the Supreme Court of the State. Nothing herein offends against the Federal constitutional rights of the Duluth Street Railway Company. The matter pertains exclusively to the rights of citizens of the same state, governed by the state law, and covered by a specific contract between themselves.

The Supreme Court of Minnesota has recently held that there is nothing invalid in section 10 of the Brooks-Coleman

Act, providing for such appeal and review; that it is not a violation of the constitution of the State of Minnesota.

City of Duluth vs. Railroad & Warehouse Commission, 209 N. W. 10 (May, 1926).

See Hall vs. Geiger-Jones Co. 242 U. S. 539, holding that "the fact that the statute designates a particular court to review the executive findings does not affect the validity", i. e. of the Blue-Sky statute of Ohio.

See John vs. Paulin, 231 U. S. 583, where this court said, "The State law and practice in this regard are no less applicable *when Federal rights are in controversy* than when the case turns entirely upon questions of local or general law".

If so, *where no contractual element exists,* certainly here, such provisions are reasonable and valid where specific valid contract exists, expressly providing for speedy review by the District Court of St. Louis County, Minn., of the rate making orders of the Commission, upon appeal *by either party to the contract.*

This Court is therefore, asked to reach a conclusion, which may be expressed in substance as follows, somewhat closely paraphrasing its own language in Henderson Water Co. vs. Corporation Commission, 269 U. S., 278, viz:

"Prior to the passage of the Brooks-Coleman Act, Chapter 278 Laws of Minn. 1921, the Duluth Street Railway Company had been bound by the terms of a contract with the City of Duluth, contained in its franchise, to carry all passengers at the fixed rate of 5 cents up to the year 1931. 'Under its original franchise it was not entitled to any judicial relief from the 5-cent fare, however inadequate the rate.' "

Columbus Ry. Power & Light Co. vs. Columbus, 249 U. S. 399.

Opelika vs. Opelika Sewer Co., 265 U. S. 215.

Public Service Co. vs. St. Cloud, 265 U. S. 352.

Georgia Power Co. vs. Town of Decatur, 262 U. S. 432.

Henderson Co. vs. Corp. Com. of N. C. 269 U. S. 278.

"The Brooks-Coleman Act of 1921 was a modification of said franchise offered by the legislature to the Duluth Street Railway Company for its acceptance, and was formally accepted in writing; and the Duluth Street Railway Company thereby became bound to all the terms of its said modified franchise, having all the elements of a contract made upon adequate consideration.

"It was only by securing a waiver of its original franchise rate of 5 cents, by order of the Commission speaking for the State, as reviewed by the State courts on appeal, under the terms of the Act, that the Street Railway Company could have any standing to ask for a fixing of rates in excess of the 5-cent franchise rate. It was therefore plainly within the power and discretion of the legislature to fix all the conditions to be attached to such 'waiver'. When these conditions were agreed to by the Street Railway Company, as was done by its filing the "declaration and consent", pursuant to the Act, its stipulations, also, became a plain contract, binding upon both parties thereto. Among many other items agreed to, all being plain matters of contract, the method of fixing the fare was agreed to. It might be more, or might be less than five cents, according to facts to be found. After the granting of partial relief by an increase of the cash fare rate, as was done thru a tentative order of the Commission, it was a proper and lawful matter of contract between the parties that further delays in the same proceedings might occur in case either party in

interest, the Duluth Street Railway Company or the City of Duluth, was dissatisfied with the new schedule; and that such fixing was to be subject to "suspension" by court order, and to review, with all reasonable dispatch, by the District Court of St. Louis County, Minnesota. It was expressly agreed that said court should then make findings upon "valuation", "reasonable rate of return", operating expenses and revenues, upon "all material facts", and that it should certify those findings back to the Commission for incorporation, unmodified, in its final order, thus *finally fixing the rate of fare.* Also either party in interest could have review by the *Supreme* Court. It was in this special way that the legislature, by stipulations agreed to by the Street Railway Company, 'determined to what extent its said "waiver" of the old 5-cent franchise rate should go'.

"No constitutional right of the Duluth Street Railway Company to be protected against confiscation could exist under such circumstances, for the method of fixing the fare, *including the necessary delays in so doing,* were matters of express contract binding upon it." Such are the conclusions, in substance, which appellant asks this court to reach.

The Duluth Street Railway Company especially was going beyond its rights under the contract, and actually deprived its adverse party, the City of Duluth, of its rights under the contract, when thru the temporary and permanent injunctions herein it successfully blocked prosecution by the city of its appeal taken in July, 1922, to the District Court of St. Louis County, made from the *same* order of the Commission.

It thus broke faith with the State, and the City of Duluth. It violated its agreement. It did not come to the Federal Court with clean hands. There is want of equity in the bill of complaint.

The City's appeal has never been brought to hearing because prevented by the injunctions. It had the right of inter-

vention as real party in interest, so recognized by the Act, and could not afford to ignore it. As intervenor, it has exhausted every effort to have the Bill dismissed.

If the decree is affirmed by this court, the city's contract right of appeal and review under the Act remains permanently blocked and lost; for by the decree the Federal court retains jurisdiction "until further order of the court", or *"until the establishment by the Railroad and Warehouse Commission of the State of Minnesota of just and reasonable rates of fare for the transportation of passengers upon the street cars in the city of Duluth"* (R. 734 at top).

This last quoted provision of the decree necessarily means the same as the first; i. e., "until further order of the Court"; for it clearly expresses intent to reserve right and jurisdiction *in the present action to determine whether or not any later rate,* also to be fixed by the Commission in the future, is *"just and reasonable".*

Thus under the terms of the decree appealed from, all parties are held under exclusive Federal jurisdiction; and no part of the provisions of section 10 of the Act, vital to the contract, can be given effect, *now or in the future.*

On such facts it is respectfully submitted to this court that want of equity is conclusively established, requiring the reversal of the decree and the dismissal of the bill.

In using this language, the Decree clearly exceeds Federal authority. That court has nothing to do with *"just and reasonable rates".* Its sole jurisdiction, in any proper case, is confined to barring rates which are *"confiscatory."* It seems evident that the trial court was proceeding on an erroneous theory in its decree.

It is to be noted in the Henderson Water Co. case, 269 U.S. 278, though in an important respect analogous to the present, there

was involved no specific "consent and agreement" of the Water Company, like that here, evidenced by the "declaration and consent" of the street railway company to all the stipulations of the statute. The North Carolina statute, creating the Commission, like those of other states generally, was a compulsory law, a flat regulation by statute, nothing more. No contractual element exists. Even so, this court distinguished the Henderson case from the Prentis case and from the Oklahoma case cited in it, *because of the pre-existing franchise contract fixing a schedule of charges.* Where the Commission had increased the charges, with conditions, this court and the trial court held that Federal interference did not *at once* accrue upon date of Commission's order; *that it should be deferred by delays deemed reasonable for practical test of the order and for exhaustion of the remedy provided in the statute and order;* and this court affirmed a dismissal of the bill, *because no application was made for the relief provided.*

It is respectfully submitted that similar reasons exist, and others stronger, than in the Henderson case, leading to a dismissal of the Bill of the Duluth Street railway company.

Here was a like former franchise contract fixing a rate of charge (5 cents). It was *increased* to a cash fare of 6 cents by the Commission's order of July 13th, 1922, also providing for a ticket rate. The legislative "waiver" of the fixed rate of 5 cents was made on *conditions,* which provided for reasonable delays, of operation and for a *final* fixing (Section 10) by the Commission. Opportunity also existed for *changes* on reapplication to the Commission on good cause shown. But above all, every provision of the Act was matter of specific contract, formally accepted in language too clear and certain for doubt.

Under the authority of the Henderson case, and the Columbus and the St. Cloud and Georgia cases and others cited in them, it is respectfully submitted that, being matter of express contract, the question of "confiscation" under the Federal

Constitution does not exist, or properly arise, in the case at bar. It is an issue, "immaterial".

No such vital element, of contract relationship, as here, existed in any of the cases of purely statutory regulation of Public Service Corporations, such as

The Prentis case, 211 U. S. 210.
The Russell (Oklahoma) case, 261 U. S. 290.
The Kuykendall (Washington) case, 265 U. S. 196.
The Prendergast case, 262 U. S. 43.

or in any similar case of compulsory statutes of other states regulating public utility rates.

In Minnesota, *street railways are not under compulsory regulation* as rates of fare. *It is matter of contract.*

The pending case is, therefore, as compared with those from other states having compulsory regulation of rates of fare, sui generis. Also, in many of the cases from other states, involving rates the Federal jurisdiction was specially based on *diversity of citizenship.*

Here the controversy is limited to citzens of the same state, and arises under local state statutes.

The Minnesota Supreme Court, in City of Duluth vs. Railroad and Warehouse Commission, 209 N. W., 10, said of the proposition that the terms of the Act constituted a "contract": "That proposition is not in the case". Their thought was, and the fact is, that the sole question in that case was the constitutionality under the Minnesota constitution, of section 10 of the Act, as being or not being in violation of the prohibition against imposing legislative and administrative duties upon the judiciary. But it sustained the validity of section 10, and held the whole Act to be constitutional and valid.

The whole Act, so being held valid, by the Minnesota Supreme Court, it necessarily results, that when accepted, it being a "contract," it is a *valid* contract, binding on the parties to it.

There is, thus, no Federal question here, and no Federal jurisdiction.

The trial court in its decree put its decision, establishing jurisdiction and failing to dismiss the bill, on the ground that the question must be determined independently of said section 10, in terms as follows:

> "The conclusions heretofore reached are adhered to: That when the Railroad and Warehouse Commission made and filed its findings, and order of July 13, 1922, fixing the rate of fare for plaintiff company, the legislative stage was ended at that point and the judicial stage was reached; that the hearing in the State District Court on appeal, which was provided for in section 10 of the Act (Chap. 278, Laws 1921, State of Minn.) is judicial and not a continuation of the legislative rate-making process, *otherwise the section is void;* and finally, that under such circumstances the street railway company had the right to bring the present suit in the Federal Court". (4 Fed. (2nd) 543, opinion; point 1, P. U. R. 1925 D. p. 231).

It is respectfully submitted to this court that the trial court vitally erred in its said conclusions:

(1st) In holding that if given effect, according to its terms, said section 10 would be void; for section 10 was affirmed as a valid provision by the Minnesota Supreme Court, as above shown;

(2nd) It erred in that it failed to give effect to the terms of the Act (including section 10, as a valid provision) *and as a contract between the parties, mutually binding;* thus eliminating Federal jurisdiction;

(3rd) Because it assumed that Federal jurisdiction should accrue *immediately* upon the filing of the Commission's order of July 13, 1922, thus ignoring the delays granted by the Act and contract, *which were reasonable delays,* in case either party wished a review by appeal. Even in absence of *contract* for delay, Federal right of interference does not accrue *at once.*

Henderson Water Co. vs. Corp. Comm. of N. C. 269 U. S. 278.

(4th) Because it offended against the principles of "comity and convenience" enforced as matter of right and law in favor of the jurisdiction of the state court, where adequate remedies are provided for the complaining party through local state statutes, as here; and because the Duluth Street Railway Company did not apply for and has not exhausted its remedies so given.

This point will be discussed as Part II. of this brief.

(5th) Because the effect of the decree and injunction is to *bar permanently any hearing and review on the City's pending appeal, by the District Court of St. Louis County, Minnesota,* of the rate-fixing order of the Commission made under said Act; and also, *of any future rate-making order under said Act;* for jurisdiction is retained under the terms of the decree until the Federal Court shall determine what shall be *"reasonable rates" later attempted to be fixed by any order of the Commission;* or, as comprehensively expressed in it, "until further order of the court"; thereby this case would not be "moot", in case, on new conditions, the Commission should make a new and later order as to rates.

Such conclusion necessarily implies that the Federal Court will ultimately determine what rates are "just and reasonable", which is not its proper function. It is only entitled to enjoin *"confiscatory"* rates.

Such conclusion also necessarily emasculates the State Statute. It has prevented one of the parties to the controversy, the

City of Duluth, from availing itself of its terms; and will continue to do so in the future. In other words, the necessary effect of the decree is to nullify a vital part of the state statute; to materially change the contract of the parties, and to destroy the rights of one of the parties, the City of Duluth, thereunder.

Finally, (6th) because on the evidence it ignored the principle that *final* injunction should not be granted, but that the bill should be dismissed "without prejudice", *in cases where no practical test* of the schedule of rates fixed has been allowed, in cases like this (See Points III., IV., V., VI. and VII. Record pp. 744-5-6); where all material facts are in serious dispute; where reasonable doubt, at least, exists; and the case of alleged "confiscation" is not at all clear; but the great weight of evidence, and all the presumptions are in favor of the validity of the Commission's order.

The last point (6th) will be discussed in part III. of this brief.

II.

While disclaiming the existence of any Federal question or Federal jurisdiction, under the facts, Appellant further submits that fixed principles of comity and convenience should have deferred Federal jurisdiction until the Duluth Street Railway Company had exhausted its rights and the specific remedies given it under the local statutes of Minnesota.

The method thereof is speedy and summary and the delays stipulated are not unreasonable.

Henderson Water Company vs. Commonwealth, 269 U. S. 278, as above shown, is authority that Federal jurisdiction does not in all cases accrue *at once* upon the making of a Commission's order fixing rates.

Prentis vs. Atlantic Coast Line Co., 211 U. S. 210.

(and especially the dissenting opinions of Justice Harlan and Chief Justice Fuller therein.)

Central Union Telephone Co. vs. Edwardsville, 269 U. S. 190

Gorham Manfg. Co. vs. Tax Comm. of New York, 266 U. S. 265

Keokuk vs. Hamilton Bridge Co., 258 U. S. 122

Farncomb vs. Denver, 252 U. S. 7, 10.

Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481

And see John vs. Paulin, 231 U. S. 583 and cases cited.

The delays provided in the Act, before *final fixing* of the rate by the Commission, were not unreasonable, even assuming the existence of a Federal Constitutional Right, (which appellant claims does not here exist under the contractual relationship of the parties).

It is respectfully submitted that the rule applied by the Court in habeas corpus cases affecting life and immediate liberty, limiting review until exhaustion of remedies in state courts, and the like rule in matters of taxes and assessments against property involving immediate enforcement, and perhaps in other cases, should likewise have operation in cases like that at bar affecting mere property claims arising under state laws giving special remedies to parties, citizens of the same state.

In 1908, the Court said in the Prentis case, supra, (*where no contractual relationship existed*)

"Considerations of comity and convenience have led this court ordinarily to decline to interfere in habeas cor-

pus where the petitioner had open to him a Writ of Error to a higher court of a state, in cases where there was no merely logical reason for refusing the writ."

Chief Justice Fuller in the said Prentis case thought, instead of holding the case in mere *abeyance*, as the majority of the court held, that the Bill should have been *dismissed*, and said:

"Power grows by what it feeds on, and to hold that state railroad companies can take their chances for the fixing of rates in accordance with their views in a tribunal provided for that purpose by State Constitution and laws, and then, if dissatisfied with the result, decline to seek a review in the highest court of the state, though possessed of the absolute right to do so, and invoke the power of the Federal courts to put a stop to such proceedings, *is, in my opinion, utterly inadmissable and of palpably dangerous tendency.*"

It seems that, certainly, as to citizens of the same state, as here, and where the contractual relationship exists, such conclusion is inescapable.

Justice Harlan in the same case said:

"It is suggested that, under this view, there is danger that rights granted or secured by the Constitution may be violated by the judgment of the Commission or by the judgment of the court of appeals of Virginia. A conclusive answer to this suggestion is that, if the final action of the commission, in any case of rate-making, amounts to confiscation of the property of the corporation whose rates are regulated, and therefore is to be held wanting in due process of law as taking private property for public use

without just compensation, and if such action be sustained by the highest court of Virginia, then the way is plainly open to bring that question to this court upon writ of error. Rev. Stat. Sec. 709 U. S. Comp. Stat. 1901 p. 575. In this way any Federal right, specially set up and denied by the state tribunals, can be adequately protected by the final judgment of this court."

The thought seems to be that the remedies in the state tribunals are adequate, seeing state courts are likewise bound to protect Federal rights; and that resultant delays for review and correction by local tribunals are not unreasonable; and that there is want of equity in a Bill where complainant ignores these remedies so provided by the local statutes.

Such was the holding in the recent case of

Henderson Water Co. vs. Corporation Commission of North Carolina, 269 U. S. 278, supra,

where this court held that a bill in equity in the Federal Court was properly dismissed where it alleged confiscation of property under an order of a state commission *which had increased by one-half the lower charges allowed to the Company under an antecedent franchise contract.* The dismissal was because the complainant had not taken advantage of the remedy allowed to it by the local law, to-wit: by making a *re-application* to the Commission for further relief after a test period to determine whether or not the rates fixed by it would prove adequate.

It is submitted that like reasons exist here for dismissal and reversal of the decree; also additional reasons, not present in the Henderson case, viz: that here citizens of the same state have solemnly contracted as per the specific provisions of the Act; and that the conduct of complainant, in violation thereof, has, up to date, successfully barred the con-

tractual rights claimed by the City of Duluth, Appellant, under its pending appeal to the state court for review of same order of the Commission of July 13, 1922; *and under the terms of the decree, if not reversed, such condition will be permanent.*

The Attorney General of the State of Minnesota is authority for the statement that there would not have been twelve votes in the Minnesota legislature for the passage of the Brooks-Coleman Act had it been understood that its provisions would not be carried out, and that Federal court interference would be applied for and obtained, by a street railway, with resultant defeat of the specific right of review given to the cities.

It is a matter of public scandal that the Duluth Street Railway Company should have repudiated its agreement made in the Brooks-Coleman Act, providing for correction and revision of the vital facts by the state courts, at least in the first instance, upon appeal to be taken by either party.

In the Keokuk case, 258 U. S. 122, supra, the Court says:

> "But the bill failed to show that plaintiff was being deprived of property without due process of law, or was being denied equal protection of the law, or that there was any danger it would be. Compare Wells vs. Nevada, 248 U. S. 165, 168. The laws of Illinois afforded ample opportunity to question the amount and validity of an assessment, both before administrative tribunals *and in the courts.*"

The Syllabus Number 2 contains the following statement:

> "A bill in the District Court to enjoin enforcement of a state tax, as based on a discriminatory over-valuation, which fails to show that plaintiff availed himself of presumably adequate remedies offered by state law * * * should be dismissed for want of equity."

Certainly, there can be no presumption here that the local courts of Minnesota, District and Supreme, would not have protected the Duluth Street Railway Co. against "confiscation" of the property, if it had appealed to them, thus respecting its obligations, under its contract.

In Central Union Telephone Company vs. City of Edwardsville, 269 U. S. 190, the Court, construing an Illinois statute, held that by failure of the complainant to exercise an option as to choice of courts given by the Illinois statute, it had, under the Illinois decisions, waived *the right of access to the Federal courts.* Therefore, this Court refused to consider the Federal constitutional points raised, and dismissed the bill. And so in other cases above cited.

Should not the same rule be applied here, under the stipulation of the agreement italicized in Sec. 4192 of Appendix hereto?

Here, the parties in interest are all citizens of the same state, and Federal jurisdiction, based on diverse citizenship does not exist.

Here, in Minnesota, Street Railways, are not, as in some jurisdictions, under compulsory, or Police Regulation, as to Rates. The matter of rates, as above shown, is here matter of *contract relationship,* voluntarily entered into by the Duluth Street Railway Company.

III.

This Branch of the Brief will make five main points.

(1) Rulings of the United States Supreme Court require dismissal of the Bill, at least "without prejudice" until practical test has been made of the untried rates. (See pages 40-56 hereof).

(2) Proper valuation should not exceed $3,800,000. (See pages 57-73 hereof).

(3) An annual rate of return at Duluth, Minnesota, of 6% on a fair valuation, in addition to 2½% as depreciation annuity, is not "confiscatory". (See pages 73-86 hereof).

(4) The normal annual expenses of operation estimated by the Master at $1,078,671.42 and affirmed by the trial court should be further reduced; and should not exceed $986,668.07, *exclusive* of taxes, state and Federal. (See pages 86-103 hereof).

(5) The results of a practical and fair test of the rates fixed by the Commission would, with reasonable certainty, under the evidence, be an annual net revenue, in excess of 8½% on the valuation as fixed by the Commission and approved by the Master; and including depreciation annuity of 2½%, would be not less than a total of 11%; and the increase of value made by the trial court, in the net sum of $409,531.78, (viz. $5,009,510) would not materially change said result. (See pages 104-125 hereof).

I. THE PLAINTIFF'S BILL SHOULD BE DISMISSED, AT THE LEAST, "WITHOUT PREJUDICE".

1) Because the plaintiff has failed to show that the rate established is confiscatory.

2) Because the plaintiff has failed to sustain the burden of proof upon each and all of the relevant facts necessary to overthrow the strong presumptions in favor of the rates established.

3) Because no practical test of the rates established has been made, it being prevented by restraining order and interlocutory injunction.

4) Because there is entire failure of plaintiff to show "that it was impossible for a fair-minded administrative board to come to the conclusion that it reached" as to the adequacy of its rate established.

5) Because it is a matter of mere conjecture, from the plaintiff's standpoint, and supported solely by the biased "estimates" of the plaintiff's manager, that a practical test would not result in proving that the rate was adequate.

6) Because no *final* injunction should issue against a legislative rate except in a clear case of confiscation.

7) Because final injunction should not issue where the result of the operation of the rate is wholly speculative and uncertain; or where the result appears to be so close to the dividing line between what is and what is not confiscatory as to demonstrate the necessity of a practical test, before declaring the rate to be confiscatory.

8) Because, (to say the least, and from the plaintiff's standpoint exclusively), the findings of the Commission, and the findings of the Master, and the evidence in this case, put this case in a class where the dividing line between alleged confiscation and a compensatory rate is too close and the margin too narrow to justify final injunction against the legislative rate, prior to the test of experience.

9) Because "fair and reasonable doubt" exists touching the validity of the findings of the Commission and of the Master as to *value* of the property as to whether or not it is excessively high; and the same doubt exists as to *operating* costs, and as to the *results of the untried rates,* when, if ever, they go into operation, especially in view of a properly reduced annual Rate of Return, appropriate to conditions at Duluth, Minnesota.

10) Because it is the claim of the City, substantiated by evidence that both Master and the Commission failed to give proper consideration to the claims of the City, that the total value should not exceed $3,800,000; as affecting very many of the elements entering into the total valuation, to-wit: as to the value of land; as to the amount to be allowed for *overheads,* both in original cost and in theory of reproduction; as to the

amount of *going concern value;* and failure existed to make due allowance for measure or value represented in the *tax valuation of the State,* $3,444,916; and in value based on the amount and market value of the stocks and bonds, $3,719,000; and for the plaintiff's own claims under oath of the officers as to value of the property in contested tax proceedings; placed at less than $2,700,000; and in other respects all important and all involved in dispute. (See Exceptions of Master's report; R. pp. 725-731; also Answer in Intervention of City of Duluth, (R. pp. 37-47).

11) Because, even assuming the value as stated by the Commission and as stated by the Master, which is the same, viz., $4,599,978.22, no specific per cent or rate of annual return at Duluth, Minnesota, is found by the Master as fair or normal; but such is a vital fact, material to the determination; and it is a question of fact *subject to judicial review;* whereas the Master refused to make a finding of fact upon the point on the erroneous ground that the fixing of such annual rate or per-cent was a *legislative* matter exclusively, and was not subject to judicial review; *and that he was bound by the finding of the Commission that* 7½% *annual return was a fair,* just and reasonable rate of annual return; and he could not raise or lower it; although he reports that it should not be increased; whereas it is the claim of the City that the evidence conclusively shows that such rate of 7½% of annual return is *excessive* as applied to Duluth and its locality; and that a much less rate of an annual return would not be confiscatory; and that an annual rate of return of 6% would not be confiscatory; as shown by the undisputed evidence; and if effect were given to this one fact, *it would alone dominate and control the whole result of this litigation; for it* would show affirmatively and beyond all doubt that the net revenues of the Company would be compensatory, and not confiscatory, under the schedule of rates established by the Commission. The difference in money be-

tween 7½% and 6% on the Commission's valuation is *$69,000.* Exception was taken to failure of Master to find as a fact what was the fair rate of return at Duluth, or vicinity, on analogous investments, and the trial court overruled the City's said exception.

12) Because although the 12 months' period succeeding the Commission's Order threw some light upon the *operating costs* of the plaintiff, yet error was committed by the Master in his findings of proper normal annual operating costs by allowing an excessive amount therefor, in a sum of not less than $92,003.35, which findings were approved by the court. That if the proper amount only were allowed, it would appear that the net revenue of the Company would be such in amount as to clearly demonstrate lack of confiscation in the rate established; or would, at least show a result so close and the margin so narrow, as to compel placing the case in that class where final injunction is denied prior to the practical test of experience, viz., (See pages 86-103 hereof).

(a) Because both the Commission and the Master and the court allowed an excessive amount as operating costs under the head of annual depreciation allowance or annuity in the sum of at least $28,000.

(b) Because the Master in his estimate improperly allowed as operating costs the amount of $42,158.69 growing out of an increased regular schedule of service put into operation by the Company without authority and in violation of the law, affirmed by the trial court; being also a schedule not before the Commission.

(c) Because the Master improperly allowed in operating costs the sum of $3,000 for attorneys' fees, resulting from this pending Federal litigation.

(d) Because the Master improperly allowed in his estimate of operating costs the annual sum of $11,415.24, the one-fifth (1/5th) amortized part of the total expense of the special

valuation proceeding taken before the Railroad and Warehouse Commission by the Plaintiff.

(e) Because the Master refused to follow the decision of the Railroad & Warehouse Commission limiting the annual normal expense for removing snow and ice to the sum of $5,000, and improperly allowed to the plaintiff in his estimate of annual operating costs an additional sum of $4,341.09.

(f) Because the Master improperly included in his estimate of operating costs an excessive amount for maintenance of bridges and culverts in the sum of $2,203.92.

(g) Because the Master in his estimate of operating costs refused to deduct the further sum of $1,060 paid by plaintiff to the Railroad & Warehouse Commission as its expenses in the valuation proceeding.

(h) Because the Master improperly allowed other items, as operating costs.

Many of the above items approved, without individual discussion by the court in its opinion.

13) Because, if proper normal operating costs and those only were allowed, it would clearly appear that the net revenue of the Company under a flat six cent rate, recommended by the Master, and court, would be excessive, unreasonable and unjust to the public and far in excess of 7½% return upon the valuation found by the Master and by the Commission (which is itself excessive); and by the court; or if not so, yet such result would clearly demonstrate that the operation of the schedule of rates of the Commission was not confiscatory; or if not so, it would, at least, place the case in a position where the result would be so close to the dividing line and the margin so narrow as between confiscation and non-confiscation as would, under proper rules of law, require the dismissal of this Bill and denial of injunction prior to practical test of experience of the Commission's rates.

14.) Because no evidence in the record justifies a conclusion that the Commission was in error *in its estimate that the rate established would prove adequate* to comply with the demands of the law, viz., that the return to the Company would be *"just and reasonable;"* and because, far less would it justify a conclusion that such result would operate to *"confiscate"* the property of the plaintiff, if a practical test of its rate should be made.

15.) Because the evidence before the Master justifies a conclusion that a practical test of the order established by the Commission would produce a rate of return of not less than 8% upon the Commission's valuation, exclusive of depreciation annuity; and the same on the court's valuation. See pages 104-125 hereof).

(a) Because the proof shows that the experience of 72 cities in the United States having a combination cash fare and ticket rate, showed the average payment of *one-third* (1/3rd) of the total number of fares, as *cash* fares, and only two-thirds (2/3rds) as ticket fares, i. e. an average payment of 5 1/3rd cents a fare.

(b) Because, with the option to the people preserved to ride for 5 cents as provided in the order (5 rides for 25 cents), there would have been no loss to the Street Railway Company in number of revenue passengers through the Commission's order. The number would have reached 28,000,000 at least.

(c) Because the enforced increased rate of flat *6 cents by Federal interlocutory injunction,* was, it was generally felt, obtained by the Company in violation of the spirit and terms of the Brooks-Coleman law, a contract with the public, which provides an appeal to the State Courts, and this in itself had provoked resentment and animosity among the people which, combined with their desire and inability to ride for the former rate of 5 cents, caused an imme-

diate and immense loss of revenue passengers to the Street Railway Company, of not les than 3,000,000 revenue passengers per year, resulting from the immediate, enormous, successful invasion of jitney competition, furnishing rides for 5 cents.

(d) Because the population of the City has steadily increased each year, and its business prosperity has increased, to the extent that in one single item, to-wit: the number of revenue passengers that the Street Railway carried in the 12 months succeeding the Commission's order *in so-called special service*, not on regular schedule, furnished to *special entertainments, concerts, ball games, theaters, etc.*, reached a number properly to be estimated at not less than 1,015,000 in excess of the number carried in 1921 under like schedules and like conditions; 126,909 more car miles were used for such specific purposes than in 1921, the "regular schedule" being the same.

(e) Because such facts, and other facts in evidence, viz., showing that the *average* of revenue passengers carried for 1919, 1920 and 1921 exceeded 28,000,000 justifies a conclusion that under the Commission's order, there would have been carried not less than 28,000,000 in the 12 months succeeding the making of the order, had it not been suspended by the Federal injunction, establishing the flat 6 cent fare.

(f) Because such facts demonstrated that under the rate established by the Commission's order, the Company would have been more prosperous than it has been under existing conditions; that conditions in Duluth are specially favorable to successful operation of the Street Railway.

This Court has repeatedly said that it would not sustain or allow final injunction against the legislative rates established by administrative boards or commissions, unless it

was impossible for a fair minded board to come to the conclusion which it reached; whereas it is utterly impossible for any person justly to conclude that the acts of the Railroad & Warehouse Commission of Minnesota in its order here attacked were the acts of a board not fair-minded. It follows that final injunction cannot here be issued without violation of the basic principle established by definite rule of this Court.

The above language was used and the same conclusion reached by the Supreme Court in

San Diego Land & Town Co. vs. Jasper, 189 U. S. 439, (23 S. C. R. at p. 574, *1902*). The Bill was dismissed.

Also, in Knoxville vs. Knoxville, 212 U. S. 1, (The Bill was dismissed) (*1908*).

Also, in Van Dyke vs. Geary, 244 U. S. 39 (37 Sup. Ct. Rep. at p. 483) in *1916*.

The principle has never been revoked, nor modified and has been the rule of action of the court for many years to the present time.

> "It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached." 189 U. S. 439, supra.

The same language was quoted with approval in the Knoxville case, 212 U. S. 1 (1908), and the bill was dismissed.

Again in Van Dyke vs. Geary, 244 U. S. 39, 37 S. C. R. at p. 483, the court said:

> "The case is presented to us on contradictory affidavits dealing with items of value which go to make up the water system. *We cannot say that it was impossible for a fair-minded board to come to the result which was reached.*"

By virtue of this specific rule, we here ask decree dismissing plaintiff's Bill.

Injunction should not issue against legislative rates except in very clear cases of confiscation.

It is never to be issued in a case where fair, just and reasonable doubt exists, affecting value, operating costs, or probable results.

It is never to be issued where the rates have not been put into operation, where the probable results are uncertain or speculative. In such cases, the court will dismiss the bill "without prejudice", giving plaintiff an opportunity to commence new proceedings after a practical test has been made of the schedule established.

It is never issued when the probable results are close to the dividing line, or where there is a narrow margin between confiscation, and non-confiscation, in absence of actual test for a proper period of time.

San Diego Land Co. vs. National City, 174 U. S. 739, 19 S. C. R. 804 (1902).

San Diego Co. vs. Jasper, 189 U. S. 439. Bill Dismissed.

Ex Parte Young, 209 U. S. 123, Bill Dismissed;

Knoxville vs. Knoxville Water Co. 212 U. S. 1 (29 S. C. R. 148) (*1908*)-Bill Dismissed;

Wilcox vs. Consolidated Gas Co. 212 U. S. 19 (29 S. C. R. 192) 1909-Bill dismissed without prejudice;

Van Dyke vs. Geary, 244 U. S. 39 (37 S. C. R. 483) (*1916*). Bill dismissed without prejudice;

Lincoln Gas Co. vs. Lincoln, 250 U. S. 256. Same result.

Darnell vs. Edwards, 244 U. S. 564 (37 S. C. R. 701) Dismissed without prejudice. Conditions too "abnormal" for fair test.

City of Louisville vs. Cumberland Tel. & Telephone Co. 225 U. S. 430 (32 S. C. R. 741)-Bill dismissed without prejudice, Evidence left case *"too much in the air"* for injunction.

Galveston Electric Co. vs. Galveston, 258 U. S. 388 (42 S. C. R. 351), Bill dismissed without prejudice;

Same case, United States Dist. Court 272 Fed. 147;

Brush Electric Co. vs. Galveston, *262* U. S. *443*, 43 S. C. R. 606. Bill dismissed without prejudice.

Georgia Power Co. vs. Commission, 43 S. C. R. 680. (1923), *262* U. S. *625*.

In the Knoxville case, supra, the Court said:

"Where the case rests, as it does here not upon observation of the actual operation under the ordinance, but upon speculation as to its effect, based upon the operations of a prior fiscal year, *we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation; The inferences were based upon the operations of the* preceding year; and the conclusion of the court below rested *upon that most unsatisfactory eveidence, the testimony of expert witnesses employed by the parties.* The city authorities acted in good faith, and they tried without success, to obtain from the company a statement of its property, capitalization, and earnings."

There is striking similarity in these remarks to the facts and situation in the case at bar.

Again the Court said:

"The jurisliction which is invoked here ought, as has been said to be exercised *only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature, and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States.* In Ex Parte Young, 209 U. S. 123, the last word of caution by the court was said (p. 166): 'Finally, it is objected that the necessary result of upholding this suit in the circuit court will be to draw to the lower Federal Courts a great flood of litigation of this character, where a Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the the state, either criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted *unless in a case reasonably free from doubt. We think such a rule is, and will be, followed by all the judges of the Federal Courts.*"

Then the court goes on to say:

"The same thought in effect was expressed in San Diego Land & Town Co. vs. National City, 174 U. S. 739: 'Judicial interference should never occur unless the case presents, *clearly and beyond all doubt,* such a flagrant attack upon the right of property under the guise of regulations as to compel the court to say *that the rates prescribed*

will necessarily have the effect to deny just compensation for private property taken for the public use.'"

And then the court says:

"And in San Diego Land & Town Co. vs. Jasper, 189 U. S. 439, after repeating with approval this language, it was said (p. 441): 'In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. *It is enough if we cannot say that it was impossible for a fairminded board to come to the result which was reached.*'"

In the Knoxville case the ordinance establishing water rates was enacted on March 30, 1901. The court says: (p. 152)

"The Company has never observed the ordinance. The suit was begun 9 months after its enactment and tried considerably later."

After citing as above shown the previous decisions of the Court showing their reluctance to enjoin legislative rates, and that it must be a clear case where they do, the Court says:

"But the case before us is not a case of this kind. Upon any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income, in any event would be substantially 6% or 4% after an allowance of 2% for depreciation. * * * *We cannot know clearly that the revenue would not much exceed that return.* We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation."

And finally the Court says:

> *"If hereafter it shall appear under the actual operation of the ordinance,* that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the State of Tennessee. *But,* as the case now stands, *there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation.* For these reasons the decree is reversed and the case remanded to the Court below with directions to dismiss the bill without prejudice."

The ultimate facts in the Knoxville case strongly resemble those here, and the same principles should apply.

In the present case the rate fixed by the Railroad Commission was not allowed to go into effect and did not go into effect. It was restrained three and one-half days after its making. What its effect actually would be if in operation becomes necessarily purely a matter of speculation. The valuation of the property is, as in the Knoxville case, greatly disputed. The evidence introduced on behalf of the City as intervenor, shows upon four or five different lines that it should not exceed $3,800,000. The evidence presented on the part of the intervenor shows that the *common and ordinary rate of annual return on capital* in the City of Duluth and in the State of Minnesota, in banking, merchandising, manufacturing, *does not exceed* 6%, (1½% below the 7½% alowed by the order of the Commission) which portion of the order is contested by the City of Duluth, *and it is entitled to a special finding of fact, on this specific point,* because it is a material fact.

"The expense account" is not agreed upon; but as to it, there is dispute in regard to important items greatly reducing

the normal operating costs annual and thus increasing the net revenues. The rate has not actually been put into operation. The inferences of the Master were based upon the operation during the 12 months' period succeeding the making of the order, *under a radically different schedule, than that of the order;* and the conditions were shown to be vitally different from those existing in the year 1921 and 1922 and abnormal; and, as in the Knoxville case, the "conclusion that the rate would not be adequate rests upon that most unsatisfactory evidence in this case," that of a single prejudiced witness, to-wit: the Vice-president and General Manager of the Company whose efforts had been expended for many years in trying to increase the rate of fare collected from the people. Here on the contrary no aspersion can be made upon the good faith, consideration, and impartial judgment of the Railroad & Warehouse Commission in its estimate of what its order would produce in the way of revenue. Its conclusions also are supported by convincing evidence. Therefore, under such circumstances, we submit in the language of this court that "It is enough (to defeat the bill of the plaintiff) if it cannot be said that it was impossible for a fairminded board to come to the estimate and the result which was reached" by the Railroad & Warehouse Commission of Minnesota.

It is respectfully submitted that the decree in the present case should follow the decision of the Court in the 12 cases above cited.

Wilcox vs. Consolidated Gas Company decided in 1909, 212 U. S. 19, 29 S. C. R. 192, is peculiarly in point in very many phases. *It reversed the decree of the lower court, with directions to dismiss the bill without prejudice.*

The question involved the constitutionality of two acts of the Legislature fixing a maximum rate for gas in the City of New York at 80c per thousand cubic feet.

The Court said:

"The rule by which to determine the question is pretty well established in this court. The rates must be *plainly* unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as, under the circumstances, is just both to the owner and the public. * * * *The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates.* In this case the rates have not been enforced as yet, because the bill herein was filed, and an injunction obtained restraining their enforcement, before they came into actual operation." (p. 195).

The court said the answer to the question involved depended upon a determination of what the value was, and called attention to the fact that value is to a considerable extent a matter of opinion, then says:

"All these matters make questions of value somewhat uncertain; *while added to this is an alleged prospective loss of income from a reduced rate, a matter also of much uncertainty, depending upon the extent of the reduction and the probable increased consumption,*—and we have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate. * * * *But where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation,* as based upon the value of the property found by the court below, and the decision depends upon opinions as to value, which differ considerably among the witnesses, and also upon the re-

sults in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, *a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate,* and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts." (p. 196).

Here, vice versa, the increase of rate to 6c (at same time destroying the option to ride for five tickets for 25 cents, operated to reduce the revenue passengers by not less than *3,000,000 belowthe average for the three previous years!* (See pp. 111-113 hereof).

The Court then took up the question of the value of the property involved and said:

"Where a large amount of the total value of a mass of different properties consists in the value of real estate, which is only ascertained by the varying opinions of expert witnesses, and where the opinions of the plaintiffs' witnesses differ quite radically from those of the defendants', it is apparent that the total value must necessarily be more or less in doubt. It, in other words, becomes a matter of speculation or conjecture to a great extent. It may be, as already suggested, that, in many cases, the rates objected to might be so low that there could be no reasonable doubt of their inadequacy upon any fair estimate of the value of the property. *But there may be other cases where the evidence as to the probable result of the rates in controversy would show they were so nearly adequate that nothing but a practical test could satisfy the doubt as to their sufficiency.*

"In this case a slight reduction in the estimated value of the real estate, plants, and mains, as given by the wit-

nesses for complainant, would give a 6 per cent return upon the total value of the property, as above stated. And again, *increased consumption at the lower rate* might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished. * * *

"The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost *can be answered only by a practical test.* In such a case as this, where the other data upon which the computation of the rate of return must be based, are, from the evidence, so uncertain, *and where the margin between possible confiscation and valid regulation is so narrow, we cannot say there is no fair or just doubt about the truth of the allegation that the rates are sufficient.*

"It might possibly be, however, that a practical experience in the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and, in that event, complainants ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree with directions to dismiss the bill without prejudice; and it is so ordered." (p. 201).

As applied to the present case the reasoning of the court in the above cited case is applicable all along the line, to all the facts of the present case. In the case at bar the Court is entitled to consider under the answer of the intervenor, the City of Duluth, its claims of value of the plant and property of the Duluth Street Railway Company as compared with that fixed by the Railroad and Warehouse Commission; as well as compared with the value as claimed by the company; and the Court must be convinced that the question of value is one in

dispute and in doubt, as to numerous important elements. The evidence shows as claimed by the city that the value ought in no case to exceeed the sum of $3,800,000; and should not exceed the sum of $3,500,000.

The facts show that such is a reasonable claim when considered in reference to the various standards and measures of value as declared by the Supreme Court of the United States in Smythe vs. Ames, 169 U. S. and other cases, to-wit: (1) The tax value shown by the evidence to be at "full value in money" as prescribed by statutes of the State of Minnesota the sum of $3,487,436, as fixed by the assessing officers of the state including the State Tax Commission, less $7180.00 as found by the Master, (Record p. 715); and (2) The capitalization of the Company shown to be *$3,719,000* (Master's report, R. p. 715), consisting of issued stock to the extent of $1,200,000 and first and second mortgage bonds to make up the difference. Assuming that this capitalization fairly represents the money expended in the plant at their full face, the said property must still be depreciated, and if depreciation is had to the extent found by the Commission, 17%, the total value on that basis would be *$3,171,000.*

(3). Again treating the value as measured by the market value of stocks and bonds, it is hereby shown that such does not exceed the value of the physical property, viz., $3,487,020 (Scott p. 395). The evidence shows the market value of the bonds ($2,519,882 @ 92% and 82%); bonds to be $2,248,180 (p. 21 Master's finding); (R. p. 714, fol. 906); and when the value of the issued stock, ($1,200,000) (R. p. 714, fol. 906) is added to this and taken at par, (although the evidence showed a less value in 1918, than par, by $124,050 (City's Ex. H, pargrs. 3 and 4), on such basis the total market value of stocks and bonds would be *$3,387,000.*

(4) Again, it is shown by the Company's own claims of value, brought down to the date of the Commission's order in

contested tax proceedings that the value of its property in 1921 would not exceed *$2,700,000.*

(5) Again, it was shown in evidence by proper comparison with the rate base fixed for the Superior Division at $1,225,000, that following the like method, the value for the Duluth division would not exceed $2,933,731. (Rec. p. 452, fol. 583).

But "fair and reasonable doubt" exists not only as to "*value,*" but also as to other controlling factors.

It exists, as to proper, normal, annual operating costs (City's exception No. V, Rec. pp. 727-730). See pages 86-103 hereof. Above all it exists, as to probable results of a practical test by experience of the combination schedule of rates as fixed by the commission. (Above points No. 12-15 inclusive). See pages 104-125 hereof.

The Master's report states the obvious fact, viz., "In the absence of a practical and fair test any estimate must be more or less conjectural." (Master's report, Rec. p. 718, second paragraph.)

There is doubt all along the line as to the justness of the plaintiff's claims. The case is not a clear one from the plaintiff's standpoint. The plaintiff has not sustained the burden of proof cast upon it on every relevant issue. It has not overthrown the strong presumptions that the legislative rates are valid.

It has not shown "that a fairminded Commission could not have come to the result reached by it." Therefore the Bill should be dismissed, in absence of a test of the rates established, at least without prejudice to try again.

In the Lincoln Gas Case, 250 U. S., 256 supra, decided in 1919, the Court said:

> "As early as the month of January, 1909, this court in two notable rate cases, indicated its view of the impor-

> tance, *in any but a very clear case,* of subjecting prescribed rates to the test of practical experience before attacking them in the courts;"

citing the Knoxville case and the Wilcox case supra, and it dismissed the Bill.

It is simply inconceivable that any person of intelligence can properly assert that the evidence in this record makes out a *"very clear case"* of confiscation, under the untried rates; or to assert that confiscation is a "necessary result of those rates."

On the contrary, the gravest doubt as to the propriety of the plaintiff's claim necessarily exists, as to the value, annual rate of return, fair operating costs; and as to practical results of operation of the prescribed rates.

In City of Louisville vs. Cumberland Telephone & Telegraph Company, 225 U. S. 30, 32 S. C. R. 741, *(1912)* the whole syllabus is expressed in the following words:

> "The enforcement of a municipal ordinance fixing telephone rates *should not be enjoined as confiscatory before giving such ordinance a trial to show its actual effect, where the evidence leaves the probable result very close to the dividing line between the yield of fair return and confiscation."*

The case was referred to a Master and he reported in favor of the City. He was of the opinion that in the *first year after the ordinance should go into effect, there would be a loss of $30,000,* but that in another year or so, in view of the probable increase of subscribers the Company would go back to its former net revenue with a probable continued increase thereafter and would earn a sufficient return. The District Judge was of a different opinion; and for the purposes of the

present decision only the United States Supreme Court adopted his figures, subject to the changes it made, but which, the Court says,

> *"Leaves us unprepared to sustain the decree without giving the ordinance a trial to show its actual effect."*

The Court reversed the decree without prejudice to come again, saying:

> "We express no opinion whether to cut this telephone company down to 6% by legislation would or would not be confiscatory. *But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid, void on this ground, and when it is considered how speculative every figure is* that we have set down with delusive exactness, *we are of the opinion that the result is too near the dividing line not to make actual experiment necessary.* The Master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60% on the value estimated by him. The judge, on assumptions to which we have stated our disagreement, makes the present earnings 5 10/17ths% with a reduction by the ordinance to 3 7/17ths%. *The whole question is too much in the air for us to feel authorized to let the injunction stand. Decree reversed without prejudice."*

The above rule and practice of the Federal Courts is also adopted and followed in like contests in the State Courts.

Municipal Gas Co. vs. Commission, 225 N. Y. 89, 121 N. E. 772, P. U. R. 1919C, 364, 367;

Kings County Lighting Co. vs. Lewis, 180 N. Y. Supp. 570, P. U. R. 1920D-p. 145;

Cedar Rapids Co. vs. Cedar Rapids, 144 *Ia.* 426;
State vs. Adams Express Co., 85 *Neb.* 25;
Storrs vs. Pensacola Rd. Co., 29 *Flor.* 617;
Hardin-Wyandot Co. vs. Commission (*Ohio*) P. U. R. 1924A-p. 122, 140 N. S. 779 (decided June 12, 1923).

and many more that might be cited.

In 225 N. Y. 89, supra, the court said:

> "Thro repeated decisions there runs the consistent thought that in controversies of this order, experience is the final test; that the courts must bide their time and let the workings of the law decide. * * * Bills to annul rates have been dismissed 'without prejudice' while the outcome remains uncertain. Bills to annul the same rates have afterwards been sustained when the vision of results was clarified by the wisdom that follows the event." (Cardozo, Judge).

In the present case Mr. McWethy (specially qualified, Rec. p. 489) testifies to his opinion that on the Commission's valuation, and with adjusted normal operating costs, the Commission's rates if put into effect would produce an annual net return of 8.7% (Record p. 583); further necessary adjustments will make it reach 9.9% exclusive of 2½% depreciation annuity, or 12.20% total. The Commission's impartial judgment was that 7½% net return would accrue.

Certainly, such evidence destroys every possibility of giving controlling effect to the estimates and biased speculations of the Company's manager. It, at least leaves the probable results in fair doubt; which doubt can only properly be solved by actual test of the untried rates.

In the Galveston case, Galveston Electric Company vs. City of Galveston, 258 U. S. 388, 42 S. C. R. p. 351, the Supreme Court affirmed the decree of the lower court.

In it "the Master who heard the case made findings in which he advised that the fare was confiscatory. The district judge who heard the case in January, 1921, found a much smaller base value and much larger net revenues. He stated that *he didn't deem it necessary to determine whether the ordinance would produce exactly 8% or a little more or a little short of it; decreeing that he was not satisfied that the ordinance produced a return so plainly inadequate as to justify this court in interfering with the action of the municipality in the exercise* of its rate making function; and in March 1921, entered a decree dismissing the bill without prejudice."

This Court said (par. 10):

"The District judge was obliged to form an opinion as to the probable net earnings in the future. All relevant facts, except as stated, and all applicable arguments were fully and clearly presented by the parties and were carefully considered by the court. Although the district judge treated the master's report as advisory merely, he passed upon the numerous exceptions taken to the Master's findings in order to indicate his view on the precise points raised. He allowed some exceptions and disallowed others. Upon petition for rehearing further careful consideration was given to the case. Views expressed in the first opinion on some matters were modified; but these changes did not call for any change in the decree. The district judge had before him some evidence not before the master; for the company's expert was recalled and testified to both to the result of operations of later months in which there was a large increase in travel, and to the heavy decline in prices which occurred after October.

Concering actual facts, there was substantially no controversy. On the elements to be considered in determining whether the rate would be confiscatory, no error was made which would substantially affect the result. *His determination whether the prescribed rate would be confiscatory was necessarily based largely on a prophecy, for normal conditions had not been restored.* He found that gross revenues were steadily increasing, *and that they were larger under the 5c fare than they had been during the preceding year when the 6c rate was in effect.* He was convinced that operating costs would decrease largely during the year. His two opinions show that every element upon which his prophecy should be based received careful consideration. *We cannot say that the evidence compelled a conviction that the rate would prove inadequate.* Compare San Diego Land & Town Co. vs. National City, 174 U. S. 739; San Diego Land & Town Co. vs. Jaspar, 189 U. S. 439; Knoxville vs. Knoxville Water Co., 212 U. S. 1".

The Georgia case, 43 S. C. R. p. 680, decided June 11, 1923, is in entire conformity with the rules of the cases hereinabove cited and quoted from; it gives overpowering weight to the conclusion of a fair-minded commission in its estimate of what a certain schedule of rates will produce and refused to overturn its conclusion and its estimates as to what its rate of fare established would produce. The court says:

> "In making each of these changes the Commission fixed a rate which is estimated would permit the Company to earn a return of about 8% on the fair value of the property. Each change of rate was made upon careful consideration. *If there was error, it was error in prophecy or error of judgment in passing upon the evidence.* We cannot say that the evidence compels a conviction that the rate would prove inadequate."

It specifically relies for its conclusion upon cases hereinabove cited and quoted from, to-wit: The San Diego case, 174 U. S., the other San Diego case, 189 U. S. 439, and the Knoxville case, 212 U. S. 1 and the Galveston case, 258 U. S. 88.

In the *Missouri Rate cases*, 230 U. S. 474, (33 S. C. R. 975), the United States Supreme Court refused to be bound by the undisputed evidence given as to value for the railroad companies, saying:

> "We are referred to the testimony of two witnesses for the complainants, men of broad experience in railroad affairs, but this consisted of broad estimates. * * * It is clear that testimony of this general character cannot be deemed sufficient to support a finding of confiscation, or to justify the annulment of the legislative acts of the state." (P. 980 S. C. R.).

In the present case the prejudiced estimates and speculations of the *single witness* for the plaintiff, on which alone the Master's recommendation can stand, viz., that of Mr. Warren, *Vice-President and Manager of the Company* stands in no better case than that of witnesses referred to in the Missouri Rate case which was not followed by the United States Supreme Court.

Here the estimates and speculations of Mr. Warren, *sole* witness are also directly met and offset by the considered estimates and judgment of an impartial Commission; and they are supported by the sworn testimony of Mr. McWethy, a trustworthy witness, and by many corroborating facts, as stated in the beginning of this argument, and as more fully set forth at pages 107-109 hereof.

This item will be further discussed in the last branch of this Brief.

2. VALUATION

The Court in Smythe vs. Ames, 169 U. S., the rule of which has never been changed has declared that all relevant facts must be given due weight and it named some of them. How much weight shall be given to individual elements is not stated. This leaves the matter to the sound and fair judgment of the tribunal charged with the duty of fixing value. The Master on page 22 of his report (Rec. p. 715) finds various values as follows:

Reproduction cost	$ 5,138,504.61
Original cost	4,222,573.00
Taxable value	3,437,436.00
Stocks and bonds	3,719,882.00
The total of this is	$16,518,396.61

If these values are averaged and thus divided by four, the resultant value would be $4,129,599.00. This would be giving *equal effect* to each of the said elements.

But the Master apparently gave no effect whatever to the *verified statements of value and claims made by the officials of the Company in the contested tax proceeding,* resulting in the value fixed by the State Tax Commission under its duty to determine the "full value in money" of the property. The claims of the Company would show a value less than $2,700,000 as of approximate date of the Commission's order, to-wit, May 1st, 1921. City's Ex. "C" p. 1-3, par. 4, Com's Ex. BB, table 6, p. 18, City's Ex. "H" (Sworn statement of Secretary of Company, original all in files.) If these claims of the Company were also considered and an average were then taken the result would be as follows:

Total value of the 4 values stated by the Master as above	$16,518,395.61
Add the Company's claims of value verified	2,700,000
And we get the total of	$19,218,395.61

Divided by 5, averaging, produces result of *$3,843,679.00.*

Moreover, in this calculation no note, has been taken of the *comparison of the Duluth Division with the Superior Division of the system,* the result of which comparison was shown by undisputed testimony. The rate base for the Superior Division as fixed by the Railroad Commission of the State of Wisconsin in May 1923, was $1,225,000, where the investment in that division represented but 29.31% of the total investment in the system. 70.61% was invested in the Duluth Division. (Rec. p. 452). On this basis, the rate base for the Duluth Division would appear to be $2,933,730. (Rec. p. 452 fol. 583). The Master and Court ignored this measure of value, viz., the considered act of the Railroad Commission of Wisconsin.

Counting this method of comparison *as one of the relevant facts* to be considered, and it ought not to be ignored, the result as to value would then appear as follows:

Total of 5 elements above stated equals	$19,218,395.61
To this add value from comparison with Superior Dvision	2,933,730.00
Total	$22,152,125.61

Averaging these 6 elements produces *$3,692,020.93.*

It is respectfully submitted by the counsel for the City of Duluth that a value put at $3,800,000 would be the full and fair

value of the property of the Company at the date of the Commission's order.

It is to be noted that in stating the capitalization, and assuming that every dollar represented by stocks and bonds was honestly expended in the property, no account in the above statements has been taken of *wear and tear* which necessarily resulted; but taking 17% only as the depreciated value of such investment (the percentage found by the Commission) this would reduce the said sum from $3,719,882 to approximately $3,171,000, the depreciation being $548,882.00. Deducting this $548,882 from the total above given at $22,151,395.51 leaves $21,602,513.61.

Now dividing this by 6, averaging all the above stated elements, produces a result and average value *$3,600,418.93.*

It is respectfully submitted therefore that the valuation found by the Master and by the Commission is reasonably shown to be excessive in a sum of from $800,000 to $1,000,000.

For the purpose of making a definite calculation as to net results of the operation of the Commission's order let us assume a valuation of $4,000,000 to be more than fair, where the question involves a confiscatory rate, taking 6½% as an annual return on such assumed but excessive value of $4,000,000.

The result is a net requirement of $260,000, whereas the rates established by the Commission were estimated to produce $85,000 more than this; and the Master's calculation on page 31 of his report, (R. p. 722), though improperly low in estimate of revenue passengers and excessively high in allowance of operating costs, nevertheless produces a result of $87,000 in excess of such 6½% on such assumed valuation of $4,000,000.

This illustration shows, it is respectfully submitted, that the plaintiff's bill in the present case should be dismissed for

absolute failure of proof to show that the Commission's rates confiscate its property.

In addition to authority from the Supreme Court of the United States to the effect *that the taxable value* is one of the elements to be considered; and that the *statements of officials in regard to value* are to be considered as relevant, we cite some additional authorities from the various State Commissions to the same point.

Peck vs. Indianapolis Co. (Ind.) P. U. R. 1916B-445;

In re Charlestown Water Co. (West Virginia) P. U. R. 1916D-725;

Commercial Club vs. Citizens Co. (Ind.) P. U. R. 1916E-1.

See San Diego Co. vs. Jasper, 189 U. S. 439, Syllabus 3.

It is manifest that under the State Statute of Minnesota requiring the assessment to be for *"the full value in money"* (General Statutes 1913 Sections 1987-8), the valuation actually fixed by the assessing authorities of the State is *a peculiarly important element* to be considered.

"Sec. 1987. Valuation of property—All property shall be assessed at *its true and full value in money.* In determining such value, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which the said property would sell at auction or at a forced sale, or in the aggregate with all the property in the town or district; but he shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money." * * *

And such of course was the duty of the State Tax Commission in its review.

It is manifest also, where the Duluth Street Railway Company appears in the contested tax proceedings by attorneys and by verified petition as here, and presents affidavits of its officials stating their claims of the utmost value, that such facts become *important elements and relevant facts* to be considered by the Court on the question of value. Here such claim of the Street Railway Company urged a value less than *$2,700,000*, and the value as fixed by the *State Tax Commission* was $3,444,616. The Master deducted $7,180 therefrom and fixed it at *$3,437,436* (R. p. 715).

The City's Brief, filed with Master, covering "Valuation", made no mention of "Cost of Financing" as an element of value.

In the Master's Report, however, he allows $89,075, for such element, both in his estimate of original cost and in his estimate of reproduction cost new (R. p. 713, 710).

COST OF FINANCING

(A) It is respectfully submitted that such cost should not be considered as part of the rate base. This conclusion is based upon the following cases and the facts in the present case, viz.,

Galveston Electric Co. vs. City of Galveston, 272 Fed. 147, decision of Judge Hutcheson, district judge;
Galveston Electric Co. vs. City of Galveston, 258 U. S. 388 affirming the opinion of Judge Hutcheson;
City of Minneapolis vs. Rand, 285 Fed. 818, decided January 1923 (C. C. A. 8th Circuit);

The Railroad and Warehouse Commission of Minnesota disallowed this item in its opinion and order on the theory that if the Company should receive any consideration on account of moneys so expended, it should be done when fixing the rate of return; *and it made its rate of return* (7½%) *larger on that account, than it otherwise would,*

See also City of Winona vs. Minnesota Power Co. 276 Fed. 996 (Decision of Judge Booth).

Apparently the Master in the present case distinguished the above cited authorities on the ground that it did not specifically appear in evidence in the cited cases *that the sums claimed were in* fact paid by the Company; whereas in the present case it did appear that $89,075 had been paid as cost of financing through bond discounts or otherwise.

It is respectfully submitted that if the reasoning of the Supreme Court of the United States is followed, and that of the Circuit Court of Appeals of the 8th Circuit, it is improper to add anything to the rate base on account of said expenditure of money whether in fact paid, or not paid.

It is evident that the Circuit Court of Appeals gave thorough consideration to the reasoning of the Supreme Court of the United States in the Galveston case cited, and therefore, eliminated the item as part of the rate base. Its language is as follows (285 Fed. 829):

> "The cost of financing is assumed upon the theory that a company desirous of establishing such a plant should not be possessed of sufficient capital to pay for the plant and should be compelled to borrow money by floating securities through brokers, and should be exposed to large discounts, if compelled to obtain money in this way."

And the court answers this as follows:

> "The fair value of the plant should not be estimated upon such a basis of impecuniosity and exactions; but upon the theory, if used, of reconstruction by those financially able to build the plant, paying reasonable prices therefor."

As authority for its conclusion it cites Galveston Electric Company vs. City of Galveston, 258 U. S. 388.

The Circuit Court of Appeals interpreted the decision of the Supreme Court of the United States to mean just that; and that it was "*immaterial*" that the Company might have been subjected to exactions and discounts; or that in any such case discounts and exactions actually made might have been treated as losses, made up by the earnings of the plant or amortized as current expenses. Its syllabus No. 7 applies the reasoning to original construction, and to reconstruction.

It is submitted that all of these reasons apply to the present case and require the exclusion of the said item of $89,075 from the rate base either as cost, or as estimated expense of reproduction new.

When the language of the Supreme Court and its reasoning are carefully considered, it appears that the judgment of the Circuit Court of Appeals is incontestably sound; and that the conclusion of the Master and trial court in this case should be overruled on that point. The language of the Supreme Court of the United States on the point in question relating to the sum of $67,078 for brokerage fees disallowed by the Court, although allowed by the Master, in that case is as follows:

> "(3) The other item included by the master in determining base value, but disallowed by the Court, is $67,078 for brokerage fees. There is no evidence that any sum

was in fact paid as brokerage, and there was included, as above shown, the sum of $73,281 for organization and business management in calculating the historical reproduction cost. The finding of the master rests upon testimony that bankers customarily get, in some form, compensation equal to 4 per cent. on the money procured by them for such enterprises. But compensation for bankers' services is often paid in the lessened price at which they take the company's securities, and is thus represented in the higher rate of interest or dividend paid on the money actually received by the company as capital. The reason given by the Master for including the allowance for an assumed brokerage fee, is that a brokerage fee is 'a normal incident of large industrial investments and has not been amortized, since the record shows that the plant has been operated at a loss.' If base value were to be fixed by the money expended, brokerage fees actually paid might with propriety be included, as are taxes paid pending construction. *But as the base value considered is the present value, that value must be measured by money; and the customary cost of obtaining the money is immaterial.* We cannot say that the court erred in refusing to include in base value an allowance for hypothetical broker's fees."

It is noticed there that the Master had considered such expense as "a normal incident of large industrial enterprises," and in the particular case allowed it because such expenses had not been "amortized, since the record shows that the plant has been operated at a loss." Even if the Master's reasoning had been sound, it would not be properly applied to the facts of the present case because the Duluth Street Railway Company has not been operated at a loss, but has earned and paid large dividends for 20 years last past. (City's Ex. A on file, original by stipulation (original, 990).

But the Supreme Court of the United States did not base its opinion upon such facts, nor on the fact of actual cost incurred, but upon entirely different reasoning, as follows, to-wit:

> "If base *value* were to be fixed by the money *expended*, brokerage fees actually paid might with propriety be included as are taxes paid pending construction. *But as the base value considered is the present value, that value must be measured by money; and the customary cost of obtaining the money is immaterial.*"

The Circuit Court of Appeals based its opinion on said thought expressed by the Supreme Court of the United States and rejected the item of cost of financing as a part of the rate base *upon the broad principle* that the fair value of the plant should not be estimated upon a basis of impecuniosity and exactions, but upon the theory of construction by those financially able to build it and paying reasonable prices therefor."

See also the reasoning of Judge Hutcheson, district judge, in 272 Fed. 147, on like point.

It seems to counsel for the City, also, that the attempt of the Company to place in the rate base an amount representing expenditures for bond issues can be legitimately described in the language of the Supreme Court in the Galveston case in its paragraph 6, which related to the Claim of the Company to a further charge of $29,500 a year on account of what it called "deferred maintenance."

The Court says:

> "This is an attempt in another form to capitalize alleged past losses; and the request was properly refused both by the Master and the Court."

It seems to counsel for the City that this present theory of "Cost of Financing" is, likewise an attempt to capitalize alleged past losses. It belongs to the same class as "developmental costs"; which, in the Galveston cases and later cases, the Supreme Court of the United States has excluded from consideration in the rate base on the theory that "past losses obviously do not tend to prove present values".

For the reasons foregoing and others that might be advanced it is respecfully submitted that error was committed by the Master and court in including the sum of $89,075 for cost of financing in his estimate of cost or in his estimate of what would properly constitute a rate base.

(B) *The Court Added An Excessive Amount As "Present Value" To The Physical Value.*

It was 40%. Opinion 4 Fed. (2nd.) 543 at page 548.

The Master had not made allowance for $663,216.66 which was expended at war prices (City's Ex. L); but the trial court made such deduction and reached the figure of $2,830,189.00 as base, and then added a clean 40% to that figure, viz., $1,132,075.00, *as actual "present value"*.

See opinion, where the figures are stated. The $2,830,189, was found by the court by deducting $663,216 (additions made at war prices 1916-1921, City's Ex. L,) from the figure of $3,493,405, stated by the court as "undepreciated value less land", viz., $3,493,405—$663,216=$2,830,189.

It is respectfully submitted that such 40% added is excessive and should not be approved, for the four following reasons:

(1) Most important of all, because simple enhanced cost is not "value." It is merely one of the relevant facts or ele-

ments to be considered in determining value as to which a judgment is to be excercised on all the facts.

(2) *Because the Commission fairly used its judgment and gave weight to all factors entering into value, without excluding any of them, and gave due consideration to the factor of present enhanced costs on a theory of Reproduction New.*

It did not overlook nor ignore it, but weighed it; and counsel for plaintiff concedes that a percentage of at least *12.99%* was covered by the Commission's order on said account on its found value.

It is in such respect, that the case here differs radically from the Bell Telephone Company Case and from the Bluefield case; for in each of those cases the lower tribunal *had wholly failed or refused to give any effect whatever to the enhanced cost, and used "investment" as sole basis of value.*

No such error of law here is found. If mistake occurred, it is one of "judgment" by a fair minded tribunal duly considering every element affecting value. The court ought not to disturb such judgment.

(3) *Because to so add 40% or $1,132,675 (40% on $2,830,-189) as the trial court did is an extreme position and ought not to be taken in fairness to the public.*

It is extreme in that it goes far beyond any similar action ever approved in any case by this Court, even when they are dealing with higher costs than were prevailing in the pending case, at time of Commission's order.

(a) This court approved a decree, limiting such addition to *33 1/3%* of value of *physical property* as applied to prices of 1919, 1920, in the Galveston case supra, decided May 15, 1922. (R. p. 433-434, Gifford).

(b) This court went no further than *22.4%* in its conclusion as to such additions, cost or value in the Southwestern

Bell Telephone case, 262 U. S. 276, as applied to prices in 1919, 1920. (R. p. 438-439, Gifford).

Galveston case basis. (258 U. S. 388)

Take Master's figures as starting point, viz. (R. p. 712, City's Ex. L, original on file.)		$3,493,405.00
Deduct (additions 1916--1921)		663,216.00
		$2,830,189.00
Add 33 1/3, as in Galveston case (R. p. 433-434, Gifford)		943,396.00
		3,773,585.00
Depreciate 17%		641,507.45
		3,132,077.55
Add property acquired to December 1, 1921		6,978.00
		$3,139,055.55
Land	$ 128,474.00	
Cost of financing	89,075.00	
Materials, etc.	105,000.00	
Working capital	30,000.00	
Going concern value	350,000.00	
Overheads	369,641.00	
Deduct	$1,072,190.00	1,072,190.00
		$4,211,245.55
Restore		663,216.66
Total on Master's figures		$4,874,462.21

But deduct	$150,000	G. C. Value (leaving it at $200,000)
Cost of Financing	89,075	
	$239,075	$ 239,075.00

Proper total reproduction cost on basis of 33 1/3rd% (Galveston case) $4,635,387.21

This is approximately the Commission's final value.

Bell case 22.4% added, (262 U. S. 276).

	$3,493,405.00
Deduct	663,216.00
	2,830,189.00
Add 22.4% (Bell case) (R. p. 439, 438, Gifford)	633,962.33
	3,464.151.33
Depreciate 17%	588,905.70
	2,875,245.63
Add land, etc. as above	1,072,190.00
	3,947,435.63
Restore	663,216.00
Total reproduction	$4,610,651.63
Add	6,978.00
As per Master, on basis of *Bell Case*	$4,617,629.63
But deduct for G. C. value and cost of financing	239,075.00
Proper reproduction cost on 22.4% basis *(Bell Case)*	$4,378,554.63

This is far below the final value placed by the Commission and here attacked.

If the trial court had used the factor of 25%, instead of 40%, as added present value, *this one fact,* would have reduced by 15% his total valuation, by the sum of $424,528.35, ($2,830,-189x.15=$424,528.35). Deducting this sum from the court's valuation (5,009,510—$424,528.35) leaves a corrected valuation of $4,584,981.65.

This is lower than the valuation fixed by the Commission.

4). Because authority to justify it is the conclusion reached in the Circuit Court of Appeals in the case of Minneapolis vs. Rand, 285 Fed. 829; *and the facts in that case are notably distinguishable from those in the pending case, as to costs and prices.* In the Rand case the Master had used a 25% increase which the court raised to 50% with dissent on this point by the Circuit Judge Stone. Judge Stone agreed with the Master and trial court as to the 25%; and differed only as to "Going Concern Value," (285 Fed. 831). But note the difference here in the facts. *The Court's effort there was to instruct the receiver as to what to charge on prices in 1920, 1921, 1922, 1923,* under a franchise ordinance requiring rates to be "just and reasonable". It was not a case involving "confiscatory" rates.

Now note the findings in that case as to costs. It cannot be claimed that they are fairly applicable to the facts of the pending case. The Court says: (p. 826 paragraph 5)

> "The evidence is undisputed that the cost prices of this property are far below the market prices of such articles at the end of 1919. The greater portion of it was purchased before 1914, and before the advance of prices incident to the war had begun. It was shown that the prices of labor, and materials, such as are required in the construction of a plant of this nature, had advanced in vary-

ing amounts from 1914 to 1920, many classes having advanced from 100 to 300 per cent. It was shown that between 1910 and 1920, prices of 15 classes of building materials, such as are used by the gas company had increased 139 per cent., skilled labor 92 per cent., common labor 150 per cent., cement 140 per cent., lumber 215 per cent., and common brick 123 per cent. * * *

"The Master also found that the costs of the iron and steel pipe used in the mains of the company had increased 169 per cent., and 124 per cent., since 1910, and that these percentages, if applied to the cost of the mains as found by the city's expert, would result in a sum almost equal to the total valuation placed upon all of the property of the gas company. He also found the cost of gas meters had increased 65 per cent., since 1910, and that everything used by the gas company in its construction work had correspondingly increased in price, so that, if the prices then prevailing were applied to the property of the company, it would result in a valuation between two and three times the valuation he had placed upon it."

Here is shown in evidence no direct comparison of the materials used, the prices paid for them, with those things appearing in the Gas plant of the Minneapolis Company.

In absence of such proof and specific evidence, it is merely a wild and unwarranted assumption that the materials are the same, that the prices of labor are the same, or that the percentages of the increased cost are the same in this Street Railway plant as in the said Gas plant.

To do so is a mere begging of the question. It is a discarding of the proper burden of proof and installing guesswork in place of the legal certainty required. Certainly the *51 or 56%* of general increase in 1921 over pre-war prices is not 100%, or

a 300% or 169%, or other large % on specific items as shown in the gas case and above cited.

Therefore, it is respectfully submitted that the 40% of increase figured by the court is excessive, and that such cost as one of the elements of value, should not have been stated by him at figure larger than 22.4%, (Bell case, infra); nor at highest more than 33 1/3%, (Galveston case).

The *50%* increase used in the Rand case should not be here used, to determine Reproduction cost, for the costs and percentage of costs are not the same. No proof of proper similarity of items is offered in the record.

Restating the relevant elements as to value we have

Reproduction cost adjusted to eliminate cost of financing only and leaving Master's Going Concern Value undisturbed, as per *Bell Case* percentage	$4,528,554.63
Original cost less cost of financing ($4,222,573 —$89,075)	$4,133,498.00
Taxable value (full value in money)	$3,437,436.00
Stocks and bonds face $3,719,882.00 depreciated 17%	$3,171,000.00
Company's verified claim of value in contested tax proceeding	$2,700,000.00
Comparison with Superior Division put at $1,225,000	$2,933,730.00
	$20,904,218.00
Dividing by 6— Value *averaged*	$3,484,034.68

Total value as per market value of bonds (Rep. R. fol. 906, p. 741) is $2,187,803.24, add Plaintiff's Duluth stock at par (R.

fol. 906, p. 714) ($1,200,000) gives $3,387,803.24 as total of both bonds and stock.

Thus the Master's and Commission's value is *$1,900,000* more than the Company's officials claimed by affidavit its value to be in 1921 as its "full value in money" under the terms of the Minnesota Statute.

It exceeds the taxable value fixed by State Tax Commission at *"full value in money"* by ..... $1,163,000!
It exceeds the market value of bonds and stock (stock at par) $3,387,803.24 by..... $1,212,000!
It exceeds the actual total actual capitalization ($3,719,882) by..... $ 880,000!
It exceeds the comparative value $2,933,730, using the Railroad & Warehouse Commission of Wisconsin as a Judge, by..... $1,666,000!
It exceeds the capitalization, depreciated by 17% ($3,171,000) by..... $1,428,000!

Is it not safe to say the value at least ought not to exceed $4,599,978.22, under these stated facts?

Ought it not to be put under $3,800,000 as claimed by the City?

3. RATE OF ANNUAL RETURN

City's Exception No. I to Master's Finding No. V. (R. 725, subds. a, b, c, d); and City's Exception No. VI. Subdivision (2) (R. 730 f. 933).

If the counsel for the City and State, and also the counsel of the complainants are correct in their views on the point, it becomes essential for the Court in this case to supplement the

special findings of the Master touching the question of rate of return, rate of interest per annum and other relevant facts bearing on what is a proper annual rate of return on the fair value; and to make a specific finding upon this material and important point. Such action seems to be required by the rule of the United States Supreme Court in

Chicago, Milwaukee Ry. vs. Tompkins, 176 U. S. 167, 179, 180, 20 Supreme Court Reporter, 336;
Lincoln Gas Electric Light Company vs. Lincoln, 233 U. S. 349, 361, 365, 32 S. C. R. 271;
Rand case, 285 Fed. Rep. at p. 825.

Certainly the Supreme Court of the United States would be entitled to have the Master's and the Court's finding *upon a fact so* relevant to, and perhaps controlling in, the proper determination and conclusion of the whole matter. In this case it is difficult to conceive how any *single fact is more controlling than this fact of what is a proper annual rate of return* to the Duluth Street Railway Company upon its valuation, in view of the special circumstances existing in Duluth and vicinity involving locality, risk, and a return equal to that generally found, accruing to similar enterprises. This question is one of *"fact"* perhaps here as controlling and material as the fact of "value" itself. This is clearly shown by illustrations as follows:

1) Assuming the value found by the Commission and affirmed by the Master, to-wit: $4,600,000.

A 6% return on this value, as claimed by the City to be justified and required by the evidence, is but $276,000.

At a rate of return of 6½%, the total return allowed would be $299,000.

At a rate of return of 7% per annum, the total annual return would be $322,000.

And at 7½% the rate of return would be, as figured by the Commission $345,000.

The difference between annual return at 6% and at 7½% is an annual net income of $69,000! Certainly such amount of net income might determine the whole case. Or, at least, it would involve the ultimate conclusion in such uncertainty and doubt (from the plaintiff's standpoint exclusively) as to require the dismissal of the Bill without prejudice, in absence of an actual test, following the above quoted rules established by the Supreme Court of the United States (pp. 40-41 hereof).

Supposing the Court should take the attitude that a 6½% annual rate of return is not confiscatory, or that it exceeds the return current in Duluth on similar investments of capital. In such case a net income of $299,000 would safely and surely escape any possible charge of confiscation under the rules of the Supreme Court of the United States. So would the income derived from a 7% rate, because it would be $322,000 annual return. Now, when the Court takes even the Master's figures (tho' erroneously arrived at) as to the result of a flat 6-cent rate, viz., an amount in excess of $347,224, (Master's report, Rec. 722), it is seen that such return is *in excess*, not only of that fixed by the Commission at 7½%, but is *$23,000* further in excess at the 7% rate; and is *$46,000* further in excess at the 6½% rate; and is *$69,000* in excess at a rate of 6% per annum. These facts demonstrate that a flat 6 cent rate is not justified, and that the Master's recommendation was not justified, and that the conclusion of the trial court, herein appealed from, is not justified. It is herein shown at pages 104-125 that the Master's "Gross Revenue" is unwarrantedly low, *because based on utterly abnormal conditions.*

(2) Moreover, when also the *Master's figures of operating costs affirmed by the decree are further reduced*, as they should be, to a figure not exceeding $986,668 instead of $1,078,-671.42 the excess of net income at a flat 6 cent rate, is still

further magnified by *$92,000*; and, certainly it is believed that the Court will be compelled to further reduce the annual operating expenses as estimated by the Master in a sum not less than $92,000. The result of such action will swell the net revenues of the Company so far above that estimated by the Master, and by the court, viz., by $116,000 at a 6½% rate, as to make a conclusive demonstration that no confiscation was probable, or possible, under the schedule of fares fixed by the Commission of they had been allowed to operate; and that a flat 6 cent rate was extortionate.

(3) Moreover, all this too, is on the assumption that the *valuation* as fixed by the Commission and the Master should not be modified below $4,600,000; whereas the Court sees the claims of the City, and the reasons for it, that the valuation should be reduced by at least the sum of $800,000, which result, of course, would produce a conclusive demonstration that the schedule of fares fixed by the Commission was not confiscatory; and that the Bill should have been dismissed.

Therefore, counsel for the City in its exception to the Master's report Number VI. Sub-division 2, *requested from the Master a special finding of fact upon what was a proper per cent of annual return in Duluth upon the fair value of the property*, as a relevant and material fact, perhaps controlling to the issues.

The Master refused to allow this exception, saying "Judge Booth knows as much about this matter as does the Master;" and thus left it for the Court to decide.

It was the contention of the City that an annual percent of return of 6% upon the fair value could be legitimately found by the evidence; and in aid of the presumptions as to the validity of the rate, should be found; that it was *required by the evidence* considering the locality, risk and returns usually sought and obtained in Duluth and vicinity by enterprises as nearly similar to the Duluth Street Railway Company as the

nature of things would permit; that a return of 6% was equal to that generally sought and obtained in Duluth and vicinity at the time of the making of the Commission's order. Owing to the refusal of the Master to make a special finding upon this point, the matter came up to this trial court to do it; and the evidence is challenged as a basis for such finding.

The master did make important findings, bearing upon the point, as follows, to-wit: He finds that the rate of 7½% fixed by the Commission is *"at least sufficient and not to be changed at the suit of the plaintiff (R. 716)*. That is to say, his finding of fact is that in no case should the plaintiff be entitled to recover on the basis of an annual rate of return *greater than* 7½%.

But while this is favorable to the defendants and intervenor, *he refused to revise the rate downward* as claimed by the City and State, as justified by undisputed evidence; and it is because of this refusal that the defendant City of Duluth is now complaining.

Other important findings relevant to this point were also made by the Master at page 32 of his report in the language as follows (Fol. 917, R. p. 722);

> "Such return (i. e., $344,998.36) is fully adequate. Interest upon the outstanding bonds amounts to $125,994.10 leaving $220,702.83 to the Company and if distributed to the stockholders would give a return upon par value greatly exceeding 7½%.

The Master finds (R. 722, fol. 917):

> "Duluth is a growing and progressive city and because of its topography street car travel is comparatively heavy. The return, even when computed upon present value, *is higher than the legal rate of interest in Minnesota; higher*

than the rate generally found in bonds or mortgages; and at least equal to the return obtained in enterprises of similar character."

The plain implication from the Master's last quoted clause is that such return of 7½ *is greater than the return in enterprises* at Duluth of similar character; and he clearly states that it is greater "than the rates generally found in bonds or mortgages," and "higher than the legal rate of interest in Minnesota," which rate is 6%.

The Master refused to make the specific finding requested, not because he thought the evidence did not justify the finding asked for by the City, but, because of his view of the law *that the Court had no power to change such 7½% rate fixed by the Commission;* that the Commission was acting in a *legislative* capacity at this point similar to the capacity in which it fixed a final schedule of rates (See Master's Report, (Rec. 716, at top, Rate of Return).

In this, it is confidently submitted, the Master was wrong; and that it was the duty of the trial court to make a finding on the special point; and that it must be decided in favor of the City's claim, materially reducing the annual rate of return below the 7½% fixed by the Commission as "just and reasonable". Moreover, this *Court is asked to conclude that there is a radical difference between a "confiscatory" rate and one that must be "just and reasonable" in the meaning of a statute or ordinance requiring it to be such.*

Banton vs. Belt Line Corp., 45 Sup. C. Rep. 534 and other cases herein cited at p. 97-98 hereof.

The two authorities cited by the Master, as basis for his said view of the law clearly do not sustain his said views (Rec. 716, Report).

The first case cited is I. C. C. vs. Cincinnati, etc. 167 U. S. 479. In this case the Court is discussing the matter of the actual *schedule of rates* fixed by the legislative authority, and is discussing nothing else, as a basis for its conclusion that the fixing of *such rates is a legislative* matter, and is not a judicial matter. Examination discovers no discussion of whether the matter of *annual rate of return* upon the fair value is or is not a mere question of fact; or whether it is or is not as such a judicial question. Much less can it be said that it determines that the declaration of a legislative board as to what would be a proper anual rate of return is conclusive upon any court. These facts lead counsel for the City to conclude that either the Master has made a miscitation of the particular case, meaning to refer to some other case not cited, or that the Master has misconceived the actual holding of the court in 167 U. S. 479.

As to the Rand case, cited by the Master, counsel for the City can see nothing in the said case which sustains the conclusion of the Master. On the contrary, it is submitted that the whole essence of the said Rand case involves the idea of the right of the Court to determine as a question of fact what should be a proper annual rate of return upon the fair valuation. If counsel for the City is right in this matter, it necessarily follows that the Master must be wrong.

As corroboration to the contention of the City in this respect, attention is called to paragraph 9 of 285 Federal 818, at page 830. In this paragraph the Court recognizes the distinction between a *gas rate* and the *basis* upon which it is fixed, for it says:

> "The Master fixed a gas rate, based upon an assumed rate of return therefrom to the owners of the Gas Company of 7½% on the value of the property and this is challenged by the City as excessive," i. e. "excessive" as more

than a "*just and reasonable*" rate. The case did not involve "*confiscation.*"

Here it is manifest that the Court is dealing with three separate and distinct things, one the "gas rate". This, everybody agrees is a legislative proposition when fixed, and secondly, two other things, to-wit: First, an assumed rate of annual return of a certain percentage; and third, the value of the property. Again, the Court recognizes that the annual rate of return is a matter of controversy depending upon the actual facts in the particular case, and recognizes the right of the respective parties to attack a stated rate of *annual return.* It does this by going into the respective arguments upon the proposition. The Court says, (Paragraph 9):

> "The only testimony as to the local rate of returns required for such investments at Minneapolis at that time shows that 8% would be required."

Then the Court goes into the question as to what constitutes the basis of such annual rate of return and quotes the Lincoln Gas case, 250 U. S. 256, and states:

> "The Court refused to approve a finding that a rate of 6% could not be regarded as confiscatory when the undisputed evidence showed that *8%* was the lowest rate sought and generally obtained as a return on capital invested in banking, merchandising and other business in the vicinity; *and that 7% was the legal rate of interest in Nebraska.*"

In the Dayton-Goose Creek case, 263 U. S. 456, speaking on the subject of what is a fair return, this Court says:

"The act fixes the fair return for the years here involved, 1920 and 1921, at five and a half per cent and the Commission exercises its discretion to add one-half a per cent. The case of Bluefield Water Works & Improvement Company vs. Public Service Commission, 262 U. S. 679, is cited to show that a return of six per cent on the property of a public utility is confiscatory. But six per cent was not found confiscatory in Willcox vs. Consolidated Gas Company, 212 U. S. 19, 48, 50; in Cedar Rapids Gas Light Company vs. Cedar Rapids, 223 U. S. 153, 172. *Thus the question of the minimum of a fair percentage on value is shown to vary with the circumstances.* Here we are relieved from *considering the line between a fair return* and *confiscation,* because under the provisions of the act and the reports made by the appellant the return which it will receive after paying one-half the excess to the Commission will be about eight per cent on the reported value. This can hardly be called confiscatory."

Decided Jan. 7th, 1924. 44 S. C. R. 169.

It is thus submitted that neither of the cases cited by the Master sustains his conclusions that the 7½% of annual return fixed by the Commission is a *legislative* declaration, not subject to judicial review; and not subject to change.

Moreover, attention of the Court, in this connection, is called to the fact that it seems plainly the intent of the Brooks-Coleman Act, Chapter 278, Laws of 1921 of Minnesota, that it be a judicial question as to what is the proper annual rate of return upon the valuation (See Section 10 thereof). That legislative declaration places the "rate of return" upon the same basis as the actual "value of the property." There is no difference. They are co-ordinate, in the same class, to be treated alike; *both* subject to the review of the court on appeal, after

the Commission has determined those two preliminary steps or bases upon which it should thereafter fix the final *"schedule of rates"*. It is this final "schedule of rates" alone that is a legislative act, and not subject to a judicial remaking. The Master failed to make the proper distinction and the trial court did not correct the error.

It is respectfully submitted that it is impossible to give effect to the reasoning of the Supreme Court of the United States in the Dayton-Goose Creek Ry. case, 263 U. S. 456 (44 S. C. R. 169), decided Jan. 7, 1924, the Wilcox Consolidated Gas case, 212 U. S. 19, and in the Bluefield case recently decided in 1923, and its citations, without reaching the conclusion that that court has determined that the question of what is a proper annual rate of return is purely a question of fact, depending upon special circumstances of each particular case; that it is a judicial question; that it is not a legislative act barring judicial review.

The following decisions of State courts, also, declare that what is a reasonable annual rate of return on invested capital is a question of fact; and that as such it is subject to judicial review.

In Duluth Street Railway Company vs. Railway Commission of Wisconsin, 161 Wis. 245, the Court said:

> "What is a reasonable return is a question of fact, the solution of which calls for the exercise of sound judgment and common sense."

This same language is adopted and approved by the Illinois Supreme Court in State vs. Springfield Gas & Electric Co. 291 Ill. 209, P. U. R. 1920, C. page 640, at page 650.

See also State ex rel. Bell Telephone Company vs. Public Service Commission of Missouri P. U. R.

1922A at pages 773 and 786; 233 S. W. R. 425 (Missouri), May 24, 1921;

Johnson County Gas case vs. Stafford (Kentucky), 248 S. W. R. 515, P. U. R. 1923C at p. 258 at top (1923).

In the last cited case from Kentucky the Supreme Court says:

> "It follows from this that the reasonableness of the rate and what is a fair return to the investor are necessarily questions of fact to be determined from the facts and circumstances in each case. The evidence in this case is *that a return of 7 to 8% is customary upon such investments at Paintsville and in that locality.*"

And especially see Waukesha Gas Co. vs. Commission, 194 N. W. 846 (Wisconsin) (1923).

It is claimed by the City in the present case that in Duluth and its vicinity such returns were shown by undisputed evidence to range from 5 to 6%; and 6% is also the legal rate of interest in the State of Minnesota. This fact distinguishes it from the Rand case, and from the facts in the Lincoln Gas case, 250 U. S. 256.

Such being the case this court, is asked to reach a conclusion that a rate of return of 6% per annum upon the fair value of the property is not confiscatory in Minnesota.

His Honor, Judge Booth, once asked the counsel for the City to define what was a *confiscatory* rate.

The Wisconsin Supreme Court has defined it as follows:

> "Before the Court can declare that a rate is unreasonably low *it must clearly appear that it will yield less than the minimum return which invested capital has a right to demand.*"

If this definition is sound, it requires, it is submitted, a dismissal of the present bill; because it cannot clearly appear that the rate of 6% per annum in Duluth and vicinity now or in 1921 was "less than the minimum return which invested capital has a right to demand." The Commission in its order specifically finds that "in recent months utilities have *"financed upon 6% basis and even less per cent basis" (R. 29).*

Again, what constitutes a "just and reasonable rate" has been defined. In 291 Ill. 209 supra, the Supreme Court puts the case thus:

> "The real test of the justice and reasonableness of any rate seems to be that it should be as low as possible, and yet sufficient to induce the investment of capital in the business and its continuance therein." P. U. R. 1920C, page 651.

When this Court declared, as it has done, in the Dayton-Goose Creek Ry. case, supra, that it is proper for the Government of the United States to limit the returns of railroads to 6½% per annum on the fair value of their property; that this does not violate any Federal Constitution right; the City of Duluth is certainly justified in asking this Court to say that, at least, an annual return of 6½% on the fair value of the property of the Duluth Street Railway Company is not *"confiscatory"*.

Figuring its income on such basis of 6½%, it is clearly seen that its revenues would be adequate, requiring a dismissal of this Bill. 6½% on the Commission's and Master's valuation is *$299,000.*

Said decision upholds the Transportation Act known as the Esch-Cummings Law so limiting by the so-called *"recapture clause"*, the returns of the steam railroads of the country to 6½%, on investments of $18,000,000,000, or more.

Also, when the Interstate Commerce Commission, acting under authority of the same Act of Congress, has determined that a return of 5¾% per annum upon a fair valuation is a reasonable rate of return on the railroad investments of the country, is it not impossible to hold that a rate is confiscatory which will give 6% as a minimum on invested capital? Surely so. And yet 6% upon a fair value of even $4,000,000 only amounts to *$240,000 per annum.* Whereas the Master finds, (Rec. 722 of his Report), under excessive allowance of operating *cost, and upon abnormally low revenues,* that $347,000 annually would be received under the flat 6c rate, viz., *$107,000* more than is a fair return at the rate of 6% upon a fair valuation of the property; and *$48,000 in excess of a return 6½%.*

Do not these facts conclusively show that the recommendation of the Master should be set aside and that the Bill should be dismissed?

One word as to what this Court said in the Lincoln Gas case.

The *refusal* by the Court to find, under the special circumstances of that case that no rate yielding as much as 6% upon the invested capital could be regarded as confiscatory is explained by the Court itself as based on the "undisputed evidence accepted by the Master that *8% was the lowest rate sought and generally obtained on the capital invested in banking, merchandising and other business, 7% being the legal rate of interest in Nebraska.*" It also took acount of the enhanced costs. Those war costs have now receded.

In that case, too, the Bill was dismissed "without prejudice."

Such holding manifestly does not support the decree here appealed from. It is not a holding that a return of as little as 6% in Duluth to the Street Railway Company would be confiscatory; for here 6% instead of 7% is the legal rate in Minnesota; and the war prices current in 1919 when the Lincoln case was decided have greatly receded; the Street Railway Company has a monopoly; and fair return is practically guaranteed to it by the Brooks-Coleman Act; *and capital is shown by undisputed evidence as willing to take 6% or even less in the financing of such enterprises, as is distinctly found by the Commission itself in its order filed herein, as above quoted.*

The Bluefield case also is plainly, radically different in its facts and circumstances from those of the case at bar.

Here, dividends were constantly being paid and had in 1920 reached the sum of $1,300,000 or more, City Ex. A. p. 4.

4. OPERATING COSTS AS FOUND BY THE MASTER, AFFIRMED BY THE COURT, SHOULD BE FURTHER REDUCED IN A SUM NOT LESS THAN $92,003.35 AND PUT AT $986,668.07, EXCLUSIVE OF TAXES.

This would increase the net revenue to like extent.

City's Exception V. (Rec. 727-730); and Point No. 12, Subdivisions A to H inclusive, of above statement of reasons for dismissal. (pp. 35-36 hereof).

The Master's estimate of $1,078,671.42, exclusive of taxes, should be further cut to $986,668.07.

On such corrected basis a flat 6c rate would, even with the unwarranted estimate of revenue passengers, as per Master's Report, (Rec. 716-718), produce a net annual revenue of more than $408,710, or 8.8% on the Master's valuation of $4,599,978.-22, aside from 2½% for annual depreciation, or *11.3%* total annual net income.

This fact demonstrates the impropriety of the Master's recommendation of a 6c flat rate affirmed by the decree. It is extortionate, unfair and unjust to the public.

Adjustment is made along the lines herein stated as follows, and recapitulation on page 102 hereof.

1) Subdivision 4, of Exception No. V. and Point 12, Subdivision A. The annuity for depreciation is excessive by not less than $27,824. It was allowed at $115,000 by the Commission. The Master says of this:

> "If an allowance for depreciation is intended to restore investment, the Commission computed depreciation upon an excessive amount. But in any event $115,000 is *sufficient*." (R. p. 719, (b).

It is clear that the Commission adopted an erroneous basis on which to calculate its allowed rate of annual depreciation, 2½%, or $115,000.

The error of the Commission, challenged, but adopted by the Master as seen and not corrected by the trial court, consists in allowing annual depreciation of 2½% on a total valuation of $4,600,000 (2½% of that sum=$115,000). Such valuation, included:

Land	$ 140,000;
Overheads	550,000;
Goin concern value	500,000;
Power Contract	110,000;
Materials and supplies	105,000;
Working capital	30,000;
The total of these items is	$1,435,000.

But such depreciation can be properly figured on none of these items and on no part of the said total of $1,435,000. 2½% on that total is $35,875.50, thus erroneously allowed by the Commission.

If the Commission had, therefore, used its 2½% only, after deducting from its stated value the said $1,435,000, it would have reached, as depreciation annuity, instead of $115,000, the figure of $79,124.50.

The Master used different figures in his estimate of original cost and of reproduction, as to value of land, value of overheads, going concern value, eliminated anything for the Power Contract and added an item of cost of financing put at $89,075, but, as seen, he adopted the $115,000 fixed by the Commission, though challenging it.

It is perfectly clear that annual depreciation cannot be allowed on land, or on material and supplies, or on working capital, or on cost of financing, or on going concern value. It also cannot be allowed on "overheads".

Annual depreciation is properly chargeable only on *depreciable property,* and not otherwise.

In this case this means that annual depreciation is allowable only on the sum of $3,487,020 (agreed cost of inventory), Basis No. 4.

The corrected amount of *annual depreciation* then would be 2½% upon said figure which is $87,175.50. The difference between this amount and the amount allowed by the Commission and adopted by the Master and court is the sum of $27,-824.50. It is respectfully submitted that this sum of $27,824.50 should be deducted from the $1,078,671.42 fixed by the Master and approved by the court as annual operating costs exclusive of taxes.

Deducting the said excessive amount leaves the sum of $1,050,846.92 to be further reduced, infra.

Authorities requiring the elimination of "overheads" in estimating annual allowance for renewals and replacements, are,

Galveston Electric Co. vs. Galveston, 258 U. S. 388, P. U. R. 1922D-159;

Galveston Electric Co. vs. Galveston (U. S. Dist. Ct.) 272 Fed. 147, P. U. R. 1921D-547-548-

In re Great Falls Gas Co. (Montana) P. U. R. 1922D-385.

A clear statement of the reasons why the depreciation annual cannot be allowed or estimated *upon overheads and other intangibles* is shown by District Judge Hutcheson in the Galveston case, Galveston Electric Co. vs. City of Galveston reported February 10, 1921 in 272 Fed. p. 147, at pages 170-171, P. U. R. 1921D-547-548. He uses the following language:

"On the other hand, when the matter of establishing the depreciation annuity is considered, the analytic process is employed, and the sum total of the value of the plant is resolved into its constituent items making up the whole which are susceptible to depreciation. Under the influence of this process *it is clear that the overhead items must be discarded in arriving at the annual depreciation allowance.*

"That this disposition is sound as to such items as interest during construction, organization expense, law expenses, etc., admits of no doubt, because under no kind of theory could they be supposed to be subject to depreciation, and what doubt might arise with reference to the propriety of including engineering charges in these figures is at once dissipated when it is considered that the property will not be constructed again as an entirety, but is to be kept up by annual renewals from time to time made, so

that engineering, and other such overheads caused by the assembling of the plant, will not have to be provided against, because they will not be again incurred.

"In short, while, if the object of the depreciation annuity were to provide a fund sufficient at the end of a period of years to replace the plant as an entirety, the percentage ought to be figured on the entire cost of the plant, including the overheads necessarily incurred in assembling, *since the object is otherwise, and merely contemplates the provision of a fund out of which annual renewals and replacements can be made*, none of these items ought to be considered in arriving at the annuity rate, for the same organization which runs the plant, the expense of which is provided for, and takes care of the renewals.

"The result of these views requires the complete rejection by the court of the figure of $1,300,000, taken in the original opinion as the basis for the 4 per cent depreciation annuity, and the substitution therefor of the correct figure, $1,000,000."

This Court approved said finding in 258 U. S. 388, supra.

In the Great Falls case above cited the Commission says at page 439 under the head of Depreciation Annuity:

"(14) The sum of the various operating expenses as computed above must be increased by the allowance of normal values for depreciation and return in order to determine the amount to which the Company is fairly entitled in revenues. This allowance is generally expressed in a percentage of the depreciable property, *and practice assumes the physical property only to depreciate. Overheads are therefore eliminated.*"

The Commission then proceeds to quote Judge Hutcheson in the Galveston case as authority and adopts his reasoning. It is submitted as conclusive on the point.

No contest should be made over the percentage allowed for annual depreciation stated at 2½%.

It was the rate approved by the Commission and by the Master. It was the rate approved by the constant practice of the Company itself, as clearly shown in the evidence. See City Ex. A, p. 7 and K. pages 5, 6, last column, (original filed by stipulation). It averaged $63,058 per year as shown by Mr. Gifford (Record, p. 423, para. A).

Also it accumulated an amount at time of Commission's order *in excess of the actual depreciation (17%)* found to exist on the property as a whole.

The accumulation was 19.7% of the investment (McWethy, Record p. 679 at top); or as stated by the Commission "in excess" of 20% of the total present "value" (Report of Commission, Rec. 28, fol. 39). See City's Ex. W (Graph) original files.

Thus no successful claim can be made for a rate of annuity *greater than 2½%;* and no successful defense can be made against the City's claims that under the law, the Commission erred in the sum of $27,824.50 in its estimate of annual depreciation, for it should have been $87,175.50, and not $115,000; and the Master's said perfunctory adoption of the Commission's error affirmed by the trial court should be corrected by this Court to do even justice to the parties.

2) City's Exception V, No. 6; Point 12, Sub-division b of above Statement, and See Master's Report p. 28, Subdivision A as to item of $42,158.69.

The Master finds as follows:

"A. During the last eight months of the year ending July 21, 1923, the plaintiff, *without asking or receiving*

authority from the City, increased the number of cars upon one or more of its lines, increasing the car miles operated by approximately 253,207, and at an increased operating expense of approximately $42,158.69." (R. p. 719 at top).

The attack of City and State is on the Master's allowance of $42,158.69 for expense of operation of said car miles 253,207, viz., those operated on "*regular*" schedule, 8 hours each day, (R. p. 645) put into effect by the Company on the West Third Street line, without legal authority and never since approved, to counteract the enormous invasion of jitney busses, operating at a 5 cent fare, after the Company's 6 cent flat rate went into effect under the injunction.

The Master shows that this was done by the plaintiff "*without asking or receiving authority from the city.*"

The resolution of the City Council fixed the schedule to a 10-minute service on that line. (R. p. 653 at top). The Company secretly put into effect a 5-minute service causing said extra expense. (R. 645).

The facts were first known and established through cross-examination on the trial before the Master, after repeated denials, evasions, and equivocations in attempt to conceal the facts.

The City challenges said action as a potential fraud upon the rate payer and City government, as wholly illegal, and defiant of a fixed "schedule and standard of service", put into force by legislative authority to protect the public against undue operating costs and to thereby preserve a reasonable schedule of fares.

The State also challenged this expense, (R. p. 652) on the special ground that the Commission's order was on trial; and that it was made on its theory of operating costs based on the "fixed standard and schedule of regular service," adopted by

the City Council of Duluth, and unchanged by such authority; whereas plaintiff was here adopting its own increased schedule at the stated unauthorized, illegal and excessive cost of $42,-158.69, *a basis or element of operating costs never before the Commission, and not contemplated by its order.* (Record, p. 652).

It is respectfully submitted that the Master was wholly in error in not deducting this sum from his estimate of normal operating costs, as requested in the briefs of City and State; and the trial court erred in not correcting it.

As matter of fact the trial court affirmed each item of operating costs, according to the figures submitted in the Master's Report (opinion, 4 Fed. (225) 543 at p. 550.

Exclusive power and authority is given to the City Council of Duluth *"to fix and amend service schedules;"* to adopt *"standards of service." "The action of the Council of any city under this section shall be final and not subject to appeal by any Street Railway."* See Sec. 4, Chapter 278, Laws of Minnesota 1921, "Brooks-Coleman Act".

The Company, secretly, deliberately and defiantly chose to violate the "schedule" of 10-minute service and doubled it to a 5-minute schedule, plainly a "regular" schedule and expressly admitted to be *"regular"* in the evidence (Record P. 641 at top 645).

Can such action be successfully defended in this proceeding, alleging "confiscatory" rates; so as to claim normal operating costs by this additional $42,158.69? If so, it must be done on the theory that it is *permanent schedule,* although made in flat violation of the fixed legislative schedule and never approved. Can this properly be done by the Master or a Court?

It is respectfully submitted that it cannot properly be done; and that this item must be deducted from the estimates of operating costs of the Master and trial court.

The present counsel for the City was the author of the resolution of the City Council fixing said schedule and standard of service. It was done at a time necessary to enable the Railroad & Warehouse Commission to properly estimate operating costs as a basis to establish rates of fare in the case then pending before it, because prior to August 1st, 1921, no action under said Section 4 of the Brooks-Coleman Act had been taken; and otherwise it could not be known what the schedule was, or its annual cost.

The purpose of "fixing" the schedule was to control operating costs and keep them to proper limits; so as not to reach such high figures as to furnish excuse for increased or excessive fares. It is manifest that control of schedules by legislative authority is necessary in the public interests. That control was exclusively in the City Council of Duluth. To sustain the Court's allowance of this $42,158.69 as *"normal"* operating cost is to assume that such change of regular service is to be *permanent;* and also that the Company was justified in ignoring or defying the City Council's authority in the matter. It is to say as a precedent, *that the Company can make its own schedules* without legislative control. This surely cannot properly be done. If it can be done in one instance, it can in all cases. This is inconceivable. The result would destroy proper control by the Council.

Two ideas of the Master on this point are subject to criticism, viz.,

1) His idea expressed that the intent of the resolution of the City Council of August 1st, 1921, was to establish, not a *"maximum"* of *"regular"* service, but merely a *"minimum"* of *regular* service (Master's Report p. 719), As shown above the exact contrary was the case.

2) His idea is expressed that any act of the plaintiff if done *"in good faith"* (p. 719) should stand approved.

This rule must be qualified by the statement that such act *must not be in violation of legislative authority, i. e. of law.*

In this case, such was the act. It was done, to be sure, on advice of counsel; but advice of counsel does not excuse violation of law. No notice or application to the City Council was given or made. It was done secretly, not on any published schedule, and was unknown to any member of the Council.

The counsel for the City offered City's Ex. "Z" in evidence at the hearing before the Master. It was rejected. The City asks this Court to receive in evidence this "Ex. Z"; or if it is deemed in itself incompetent to allow presentation of oral evidence of members of the City Council which passed the resolution of August 1, 1921, showing its purpose to be that claimed in this brief. The Galveston case, supra, is ample authority for such action.

Certainly an item of $42,158.69 as *operating costs* unauthorized by sole legislative authority, is of an importance as affecting results here sufficient to justify a little evidence before the court itself, for it means an item of increased revenue of same amount. This sum alone, deducted from the Master's and Court's estimate of annual operating costs, is deemed sufficient to overthrow the Master's and Court's recommendation. Making reduction then of said sum of $42,158.69 from the balance just above stated, $1,050,846.92, leaves *$1,008,688.23.* This to be further reduced as follows:

3) City's Exception V item 10; (R. p. 730); point 12, Subdivision C of above statement. As to attorney's fees in this pending Federal litigation, Judge Booth in the Winona Gas case, supra, disallowed such items.

The Master and Court allowed $3,000 in operating cost estimate for such attorney's fees. The full charge for such fees was $15,000. The Master allowed it, but amortized it into fifths, viz., $3,000 per year and reduced the expenses by $12,000 only (R. 719).

The whole theory of such allowance is wrong and against public policy. To approve it would be to encourage and foment Federal litigation. It is against all precedent, which is that parties pay their own attorney's fees, except where express statute allows counsel fees to be charged. No state law of Minnesota allows such charge. "Statutory costs" in the sum of $10 is the limit there in cases of all kinds, though millions may be involved. It seems absurd to claim that these attorney's fees in Federal court are a *"normal"* operating annual cost.

If the plaintiff prevails in its present action it will recover what are proper taxable costs and no more. But these taxable costs in Federal court do not provide for payment of attorneys fees necessarily incurred by the parties. The amount of such allowance in the United States Supreme Court as "statutory cost" is, we believe, the large sum of $20.00 and no more.

Reducing the Master's estimate still further by this third item adds $3,000 more to the net revenues.

See also authorities cited below on next point under head of *"rate making expenses."*

4) City Exception No. IV. Item 7; (R. 729); Point 12 of above statement, Subdivisions C and D. Items of Rate making expense, $11,415.24; attorneys fees $3,000; and amount paid to Commission $1060.

The Master and Court allowed as proper annual operating cost the sum of $11,415.24, the 1/5 part of a total of approximately $57,000 incurred in the valuation proceeding before the Commission.

The Commission had so allowed it, as an expense to be provided for in fixing its schedules of rates; and Mr. McWethy included it in his own estimates of returns (Com's Ex. CC, p. 42-50). No fault can be found with such action of the *Commission in so discharging the duty incumbent on it* in determining what was "just and fair and reasonable" as to rate of return.

But the situation is radically different here in Federal Court, where the question is, not whether the rates are "just, fair and reasonable" in order to comply with the Statute requiring them to be such. Here the sole question is, "Is the operation of the fixed rate *'confiscatory?'* "

The duty of Commission and the function of the Federal Court are entirely different, governed by different rules.

That there is a difference between a "confiscatory rate and a rate which under contract or statute must be "just and reasonable", seems to be thoroughly established by the decisions of courts Federal and State, and is founded in reason as well as authority.

Banton vs. Belt Line Corp., 45 S. C. R. 534.
Galveston Electric Co. vs. Galveston, 258 U. S. 388, Par. 2.
Newton vs. Consolidated Gas Co. of N. Y., 258 U. S. 165,

where the Court says: "It seems proper to add that we do not intend by anything said herein to intimate what would have been a reasonable rate for the sale of gas under the circumstances disclosed. The 80c rate was confiscatory." (Last paragraph of opinion).

Minneapolis vs. Rand, 285 Fed. 818
(Circuit Court of Appeals 8th Circuit, Par. 9)
Duluth St. Ry. Co. vs. Railroad Commission, 161 Wis. 245,

where it is said: (pages 262-263): "The duty of the Commission is to fix a reasonable rate rather than a non-confisatory rate."

Union Pacific Ry. Co. vs. Public Utilities Commission, 95 Kans. 604,

where the Court says: "Unreasonable, unjust, oppressive and unlawful rates *are not synonomous with confiscatory rates.*"

See valuable note in 53 L. R. A. pp. 5-66, 1915A, covering all phases of confiscation and difference between it and reasonable rates, especially subdivision 3 and notes on page 21, et seq.

Waukesha Gas Co. vs. Commission—Wis. 194 N. W. 846

State Commission vs. Springfield Gas Co. 291 Ill. 209.

AUTHORITIES DIRECTLY IN POINT, FEDERAL AND STATE TO THE EFFECT THAT EXPENSES INCURRED IN RATE HEARINGS ARE NOT TO BE ALLOWED AS OPERATING COSTS IN A SUIT INVOLVING THE QUESTION AS TO WHETHER THE RATE IS CONFISCATORY. They are *abnormal.*

The situation of a Commission fixing a rate under the Brooks-Coleman Act, and of a court in a *confiscation case,* is seen to be radically different.

Reno Power Light & Water Co. vs. Public Service Commission of Nevada, P. U. R. 1923E-485, page 500, decided June 4, 1923, and cases cited; 300 Fed. Rep. 645.

New York & Queens Gas Co. vs. Charles C. Newton, P. U. R. 1921A-530 at p. 535 (Nov. 3, 1920); 269 Fed. R. 277.

Winona vs. Wisconsin-Minnesota Light & Power Co. 276 Fed. 996, 1005 P. U. R. 1922C, 461, decided by *Judge Booth,* disallowing legal expenses in confiscation suit.

Kings County Lighting Co. vs. Lewis, 180 N. Y. Supp. 570, 586, 591, P. U. R. 1922D, 145.

In the Reno case above cited United States District Judge Farrington, dissallowing $8594.94 as expenses of *rate hearings*, says:

> "Such items are deemed to be *abnormal* and are not entitled to consideration in determining whether rates are confiscatory."

In the New York & Queens Gas Company case vs. Newton, above cited, United States District Judge Mayer at page 535 says as to "*expenses of litigation*":

> "These were also excluded by the Master, but were allowed by the Court in Consolidated Gas Co. vs. Newton, 267 Fed. 231, P. U. R. 1920, F. 483, I should follow the decision on this point of the Consolidated Gas case were it not that *I am firm in the conviction that while this item may properly be charged in fixing a rate, it is not to be included in determining whether the rate is confiscatory.* I agree with the Master both in this conclusion and his reasons therefor."

While the Commission itself, under the terms of the Statute, might properly include such expense as an operating expense, by amortization, in ordinarily fixing a rate, the situation is entirely different when attack is made upon the rate by suit in Federal Court charging that the rate so fixed is itself confiscatory. From the very nature of the case it is seen that the expenses of a valuation are abnormal; and usually, even when allowed by a Commission, are only run for a few years and then cease to be an expense at all. So here, in the course of next year, 1927 this item disappears. On the theory that a valuation is not to be changed very often, it is confidently submitted that a Federal Court is not justified, *in a confiscatory*

rate case, in considering any expenses of a valuation as a normal, ordinary expense of operation. This point operates to cut the operating expenses as allowed by the Master, and to increase the net revenues correspondingly, in the sums as follows:

$11,415.24 as general amortized annual expense of valuation; it eliminates $3,000 allowed by the Master as amortized expenses of litigation in the Federal Court as attorneys' fees; it also eliminates a charge of $1060, expenses paid to the Commission; total $15,484.00. These items added to the net revenue would of themselves, place the net revenues, on the basis of a flat six cent rate, so much in excess of 7½% return on the Commission's valuation or even the trial court's valuation, as to demonstrate the injustice of it and to require the dismissal of the plaintiff's bill, at least without prejudice. (See Master's result of $347,224.39 on 6 cent basis, Report p. 722).

Also, in the Reno case Judge Farrington says:

> *"(15) Finding as I must that the revenues of the Company for the year commencing April 1, 1921 are unusually low and the operating expenses abnormally high, it is unfair to use them as presented in determining whether the rates prescribed by the Commission are confiscatory."*

The justice of this conclusion is obvious, and equally applies to the situation in Duluth.

Thus, further deducting said $15,484.00 from the last figure above reached as to items 1, 2 and 3, viz., $1,008,688.23 we reduce the Master's and Court's estimate of cost to ($1,008,688.23 —$15,484) $993,204.23.

This is to be further reduced, see next items.

5) City's Exception V Subdivision 8; (R. p. 729); Point 12, Subdivision E.

Item of Snow and Ice, $9,341 which was *$4341 in excess* of the allowance made by the Commission, viz., $5000.00, as normal expense.

The Company claimed to have spent *$9341* for snow and ice removal, Account No. 12.

The evidence clearly shows this amount to be *unusual and extraordinary*, and no fair measure of a normal cost.

For 8 years, 1914-1921, inclusive, the average cost was, a/c 12, *$4994.09* (Com's Ex. CC., p. 6, original in file). In 1921 it was *$3535.72* (Com's Ex. CC., a/c 12, p. 3, original in file). The Commission in adjusting and estimating operating costs as basis for its order fixed the "normal" annual amount at *$5,000.* No sufficient evidence exists in the record to overthrow the *considered judgment of the Commission as to such item.* This is a fair instance of where full effect is to be given to the considered judgment of an impartial Board, fixing a "normal" cost.

Actual cost in a particular and unusual year, as seen from all the authorities above cited herein, is not the measure of operating costs, but the usual, ordinary and fair average over a sufficient period of years to form a reasonably sure basis. By this test, $5,000 only should be allowed. But the Master by refusing so to do, allowed $9,341 or nearly double the usual sum required for that purpose. This extra $4,341 should be deducted from his said estimate.

See Commission's Ex. CC., p. 42 a/c 12, on file, and Mr. McWethy's explanatory testimony (Record pp. 544-5).

6) City Exception V, Subd. 9 (R. 729); Point 12, Subdivision F, (p. 36 hereof).

Account 15, Excess of expense on Bridges and Culverts, is $2203.92 in excess of the usual and normal.

This fact of excess over the fair annual expense for that purpose was established by the undisputed testimony of Mr.

McWethy (Commission's Ex. CC., p. 42 and explanatory testimony) (Record pp. 544-545).

Thus, it is confidently submitted the Master's and Court's estimate of normal annual operating costs should be reduced by deduction of the following items as above set forth, viz.:

By excess annuity depreciation	$27,824.50
By illegal increase of regular schedule	42,158.69
By attorneys' fees in Federal Court	3,000.00
By rate making expenses	11,415.24
By payment to Railroad & Warehouse Commission in rate making	1,060.00
By excess allowance for Account 12, snow and ice	4,341.00
By excess allowance for Account 15, Bridges and culverts, etc.	2,203.92
Total reduction to be made	$92,003.35

As the Attorney-General stated in his brief filed with the Master, it is far more than likely that many other items of expense occurred in excess of normal, which were not detected or disclosed in evidence, operating to the disadvantage of the public in this investigation.

But at least the Master's estimate and Court's allowance of $1,078,671.42, as annual operating costs should be further reduced to the extent of $92,003.35 as above shown. It should, therefore, be fixed by this Court at not to exceed the difference, viz., *$986,668.07 ($1,078,671.42—$92,003.35), exclusive of State and Federal income taxes.*

Instead of the table on page 31 (R. 722) of the Master's report under "Adequacy of Return," a new one should therefore be made with proper adjustments. Assuming, *for the present only,* the Master's figures as to *revenue passengers* at 6 cents, the new and corrected table would thus appear:

25,384,100 revenue passengers at 6 cents		$1,523,046.00
Other revenues		15,202.62
Total revenue		$1,538,248.62
Operating expense	$986,688.07	
Taxes, state	81,351.29 (Master's report p. 721)	
	$1,068,039.36	1,068,039.36
		$ 470,209.26
To find Federal tax; From this	$470,209.26	
Deduct 5% interest on $2,519,882.00 bonds apportioned to Duluth System, viz.,	125,994.10	
	$344,215.16	
Upon this 12½% is $41,305.81, instead of $31,001.65 as per Master's figures		$ 41,305.81
Net return is		$ 428,903.45

This is in excess of 9% on the valuation found by Master and Commission at $4,599,978.22! It is also 8.56% on the increased valuation, $5,009,510, fixed in the decree! But the said valuations are excessive as above shown. Also the rate of return of 6% at Duluth is not confiscatory, especially when 2½% additional is allowed for yearly depreciation. Such figures conclusively demonstrate that the recommendation of the Master and the Court should not be followed. Such net return is far above the $345,000, stated by the Commission to be "just and reasonable", with 2½% allowed for depreciation it reaches the total of 11½% on the Master's valuation, and 11.06% on the Court's valuation. In endeavor to avoid confiscation, extortion on the public is thus perpetrated.

5. The Commission's Considered Judgment as to the Net Revenues to Accrue From its Schedule of Rates Could not Properly be Overthrown by the Recommendation of the Master Approved by the Trial Court.

For such recommendation was based upon mere conjectural estimates founded on conditions extraordinary, unusual, and abnormal, resulting in a sudden reduction of 3,300,000 revenue passengers below the average for the three preceding years, 1919, 1920 and 1921; also, where the actual schedule of rates fixed by the Commission never went into effect, being barred by the Federal injunctions.

Positive and persuasive evidence in this record supports and confirms the considered judgment of the Commission.

This court will note that the Master's value was the same as the Commission's, namely, $4,599,978.22; also that the Master advised against any increase of the Commission's 7½% as annual return. The trial court raised the value to $5,009,510.00, but such raise, so far as the schedule of rates is concerned, could not materially affect the questions involved.

It is respectfully submitted that vital and reversible error occurred in the action of the Master, approved by the trial court, in failing to follow the recommendation, estimates and schedule fixed by the Commission; that their conclusions are not justified by the evidence, and are irreconcilable with the rules of this court many times declared, requiring clear and satisfactory proof by complainant that legislative rates are in fact confiscatory; and the decree should be set aside.

The careful attention of the Court is invited to the facts herein stated as follows:

As to gross revenues, the rates never having been tried, they were manifestly involved wholly in speculation and uncertainty.

But every presumption of fact and of law favors the estimates and judgment of the Commission as a fairminded tri-

bunal, while such uncertainty exists and until Plaintiff has proven "*necessary* confiscation", under the settled rules of the United States Supreme Court above cited, a *final* injunction must be refused. See authorities cited at pp. 40-41 hereof.

The Master says:

> "The defendants and intervenor insisted that the period so taken did not furnish a proper test for the reason that the Commission's rates, never having been put into operation, no sufficient test had been, or could be made as to their effect." (R. 718).

He then says: "*In some respects this contention is true.*" But he concludes that the year furnished some light on the question of "*operating costs*" (R. p. 718). We agree to this, but it does not aid plaintiff; for reasonable certainty on one relevant fact, viz., "*operating costs*", does not supply lack of such certainty on all other relevant facts, or on "gross revenues"; and such lack here exists. Speaking of one item of estimate of probable revenues, he says:

> "*This estimate is probably excessive but in the absence of a practical and fair test, any estimate must be more or less conjectural.*" (R. p. 718, 2nd para. from top).

It is obvious that no estimates offered by plaintiff's single witness, its own manager, to overthrow the rates established by the Commission, could be anything else than mere "conjectures" and "speculations", "in absence of a practical and fair test" of the rates.

It is at this point that the Master's recommendation and the decree appealed from, conflicts squarely with the rules of this Court, as set forth in the authorities cited in the first branch of this brief at pages 40-41 hereof, the Wilcox and Knoxville cases, and all the rest, Federal and State.

The fact that 25,384,100 revenue passengers (Report p. 716) were carried in the said 12 months' period cannot be controlling, nor even persuasive, *as to what the number would have been under normal conditions of operation of the rates; for the conditions in said period were revolutionary and utterly abnormal, a complete change from former conditions for 40 years* in Duluth.

Judge Farrington says in the Reno case, supra (p. 98 hereof):

> *"Finding as I must that the revenues of the Company for the year commencing April 1, 1921, are unusually low,* and the operating expenses abnormally high, *it is unfair to use them as presented in determining whether the rates prescribed by the Commission* are confiscatory."

This language and conclusion are strikingly apt as applied to the figure of 25,384,100 revenue passengers referred to by the Master and used as basis for his recommendation for the injunction here appealed from. This aptness of conclusion is seen at a glance when comparison is made with the average number of such passengers carried in Duluth in the years *1919, 1920 and 1921. Such average was 28,702,571* (Warren's testimony p. 310 of Record). Thus 3,300,000 less were carried in said last 12 months under this injunction that the average of the previous three years! *How comes this enormous discrepancy?*

Also, *1921* was a year of financial depression in Duluth, even reaching the proportions of an industrial slump. The largest industries were closed and thousands of workers were unemployed, and general economy was enforced by the citizens. Yet even under such circumstances in 1921 the Company carried *27,246,916* revenue passengers. On the contrary. the said 12 months' period, *1922-1923 was one of general em-*

ployment, of business and industrial activity and of marked increase of population.

The City Charter of Duluth of which this court takes judicial notice, contains provisions based on annual increase of 2.6% in population above each preceding year. Assessment for taxes rests on a per capita basis, using such annual percentage of increase as its base (Amendment of January 1923).

The Master finds:

> "Duluth is a growing and progressive city and because of the topography, street car travel is comparatively heavy." (R. p. 722, fol. 917).

The fair question then arises: With increased prosperity, with increasing population, with topography forcing increased traffic, why should the number of revenue passengers be less in 1922-1923 than in 1921, (a year of depression) viz., 27,246,-916? Or why should it fall below the *average* of 1921, 1920 and 1919, viz., 28,702,571? *No good reason can be advanced why the annual number of revenue passengers should not have been 28,702,571, if the legislative rate fixed by the Commission had been allowed to go into effect, i. e. 6 cents as cash fare, and five (5) tokens for 25 cents.*

The testimony of Mr. McWethy, statistician and engineer of the Commission, and a most trustworthy and competent witness, is as follows: after his adjustments, as to operating costs, up to time of his testimony.

> "Q. (Mr. Richards). I will ask you: this result that you get, leading to an adjustment which gives you 8.7% *on the Commission's valuation, I will ask you if that represents your best judgment of the effect if the Commission's order had been allowed to go into effect uninterfered with by Federal injunction? A. It does.* Q. And for the

reasons heretofore stated and shown in these exhibits, Commission's Exhibt CC? A. It does." (P. 583 Record). See also his testimony immediately preceding.

Does the biased speculation of the Vice-president of the St. Ry. Co., sole witness for complainant on this point, Mr. Warren, make out a *"clear case of confiscatory rates"* in the face of such testimony of Mr. McWethy, a most competent and trustworthy witness? Surely not so.

Mr. McWethy further testified: *A. "Well, it is my opinion, if I get your question correctly that the installation of the Commission's fare would have very little effect on the number of passengers that would be carried under a five cent fare, due to the fact that, with the tickets in effect, more passengers could be handled in the same space of time, more easily, that the riding conditions would be better; and it is my opinion that under the Commission's rate of fare, the number of revenue passengers would have been decreased very little if any over the number of passengers which would have carried on the five cent fare. Now, if the Company's estimate of 4% decrease with the six cent fare in effect is correct, then my assumption here is right."* (R. p. 557).

Again on (R. p. 558) he says:

"I think that with the placing of the ticket rate in effect, the reduction which would come about by the six cent fare, would be more than made up by increases in the ticket fares; so that in my opinion even with the 33 1/3% cash and 66% tickets, there would be very little reduction in street railway travel over street railway travel at a straight five-cent fare."

"Q. You think the tickets would be pretty popular?

"A. I think they would be popular to the extent of about 66 2/3." (R. p. 558).

As shown, the *admitted* average number of passengers for the three (3) previous years was 28,702,571. Again on next page, cross-examination continued, he says:

"A. Yes, it is my opinion that with a ticket rate in effect, the ticket rate of five cents in effect, the jitneys would not have a chance to be the competitive factor which they have developed into." (R. p. 559, fol. 714 at end).

At page 684 Record, fol. 865, he says:

"Well, it so happens that the average of all these companies, and there are *seventy-two companies,* and the straight arithmetical average of the percent of riders who pay cash was 33.59%; and riders who rode on tickets was 66.41%."

His conclusion was expressed as follows: "We believe that with this data at hand it establishes, as far as it can be established, that the Commision's estimate of 33 1/3% split for cash fares, and 66 2/3% for tickets in Duluth, is a fair and reasonable estimate." (R. p. 576 at top).

This would produce an average fare of 5 1/3 cents. 28,702,571 fares @ 5 1/3 cents=$1,530,803.78. Add *"other revenue"* (Master, R. p. 717) viz., $15,202.62 and gross revenue is $1,546,006.40. This exceeds by $138,411.88 the Master's estimate ($1,407,594.62) of gross revenue, (R. p. 717).

When the Commission's statistician and engineer, Mr. McWethy, stated as above that the Commission's rates in operation on its valuation would in his judgment, on his adjusted

operating cost produce a net income of 8.7% per annum (R. p. 583), his answer, *was also made on assumed operating costs, higher than those to be allowed.* The following additional items should be deducted from Mr. McWethy's statement of costs, thus adding to net return, viz.:

1) The $42,158.69, cost of illegal increasing of regular schedule on West Third Street as above shown. *This fact had at time of his quoted statement had not been disclosed to Mr. McWethy, and was therefore not in Mr. McWethy's mind or estimate. It was later disclosed in evidence.*

2) He had also made no deduction in his said conclusions for the *"Rate making expenses"* allowed by the Commission, viz., $11,415.24; or the $1060 paid to the Commission; nor the $3,000 attorneys fees of in Federal Court.

If these items were considered in connection with his testimony, it would necessarily raise his estimate from 8.7% to a higher one. The amount to be so added is $56,633.93 ($42,158,-69 plus $11,415.24 plus $1060 plus $3,000). So treated, on the basis of his considered and sworn opinion the annual return to the Company from the Commission's rates if tried, would have been in excess of *9.7%*, to be exact, it would be (8.7% plus 1.2%) *9.9% plus!* It was his belief that if the option to the public to ride for 5 cents (5 tickets for 25 cents) had been preserved, and not destroyed, by the injunction issued, the raise of the cash fare to 6 cents would not have decreased the riding; that the same number would ride as before; that the invasion of the jitney busses would not have occurred; and his table (Com's Ex. CC, in file) shows in detail his basis. The detail underlying this statement is shown on pages 47-50 of said Commission's Ex. CC. and pages of Record 580-583.

It may be asked, why is not this sworn opinion of such a man, entitled to weight by this Court? Is it not entitled at least to as much consideration and given as much weight, as

that of the sole witness Warren, plainly a biased estimater, as Vice-President of the plaintiff?

And what of the weight to be given to the judgment of the Commission itself?

In the face of this sworn opinion, bolstered by the specific facts presented in its support, viz., that 8.7% would have accrued, (9.9%) can it be said fairly or properly that plaintiff by the evidence has made out a "clear case", "a very clear case", a "flagrant attack" on property rights of the plaintiff, a case of confiscation, requiring injunction? Does not the weight of evidence, as well as all legal presumptions, require confirmation of the act and rates of the Commission? Where is the "certainty" of confiscation? Where is the "necessary result" of confiscation? Does plaintiff produce such evidecne? What becomes of the rule of Burden of Proof? What has happened to the Rule of "Every presumption is in favor of the legislative rates?"

It seems at this point that the Master, followed by the court, without due cause, clearly went astray. They failed to follow the wise landmarks of the law. The Master should, having adopted the Commission's value, and its 7½% return, also have refused to inferentially charge the Commission with unfairness in its judgment as to the effect of its rates. He has failed in every finding to convict them of either unfairness, or of "error in judgment" or of "error in prophecy" as to results. He was merely speculating and conjecturing.

The Georgia case, supra, and cases cited in it.

This loss of *3,300,000* revenue passnegers *below the average of those carried in the three previous* years is so remarkable as to show abnormal conditions; and it is not "fair", as Judge Farrington states, to set aside considered legislative rates on abnormal conditions shown, nor where the year shows "unusually low revenues," or "exceptionally high costs."

Reno case, supra.

This astonishing and abnormal shrinkage in one (1) year below the record of *1921, when the same "standard of regular service" was required by law,* was (27,246,916 minus 25,384,-100) *1,862,816!* This even in face of increased population, and of the passing of the period of business depression of 1921. This also in face of the fact shown herein below that 1,015,272 more revenue passengers went to entertainments on cars in *irregular* service in said 12 months than in 1921.

This enormous discrepancy and extraordinary situation requires explanation. It is found in the destruction of the right of the public to buy 5 tickets for 25 cents; but more especially in the exasperation of the public against the Company *over the history and manner in which it was done.*

First, great resentment arose over the passage of the Brooks-Coleman Act, after the Duluth public had in two successive elections in 1920 refused to submit to a flat 6 cent fare. They blamed the Company for the passage of the Act which put the matter of fares into the control of the State Commission.

Then, especial resentment was aroused when the Company, repudiating its agreement with the city and state, went into the Federal Court, refusing to trust the justice of its case to the State courts, by appeal to the district court and the State Supreme Court on questions of value and of proper rate of return, as questions of fact, and as by it agreed to in Sec. 10 of the Act.

The combined result of this hostility, and of the cheaper rides furnished by jitneys rushing in resulted in the immediate and enormously successful invasion of those jitney busses, operating for 5 cents.

Prior to August 1st, 1922, the jitney competition was negligible, not exceeding 600 revenue passengers per day *and none*

existed prior to 1921. This if carried throughout the year would only mean 219,000 passengers or $10,000.

But when it reaches proportions in 1 year reducing the revenue passengers from 1921 by *1,862,816;* or, especially when the flat 6 cent rate cuts the *average of the three previous years* (even under the new conditions of general increase of population and prosperity) by the sum of *3,300,000* revenue passengers, the condition becomes extraordinary indeed, and wholly abnormal. The situation cannot be laid to automobile use. The Commission's order cannot, fairly, be judged on such unusual and extraordinary terms. But the Master did so, and the trial court did likewise. It should be judged under *normal* conditions, as shown by previous experience, properly projected into the future.

Such was the basis of the judgment and estimates of the Commission. *They were carefully made, with entire impartiality, and close analysis of conditions, after full and fair hearing, and elaborate oral and written arguments of the parties, represented by counsel;* and the cash fare was raised 1 cent.

The order of the Commission itself and the testimony of Mr. McWethy and others, show how critically all factors were examined, both of value, and of operating costs, and of estimates of revenue (See Commission's Ex. CC pp. 1-50 and Mr. McWethy's explanatory testimony). The care and diligence and patient dissection and analysis are nothing less than remarkable.

The Master and trial court however fell into the error of judging by abnormal conditions, and solely on the sudden and extraordinary fall in number of revenue passengers. He says, "Had the expectations been fulfilled, it is entirely possible the rate would have been found adequate. But during the 12 months period ending July 31, 1923, the plaintiff actually transported only *25,384,100 passengers.*"

That is to say, his view is that if the judgment of the Commission had been confirmed by actual experience, the plaintiff could find no fault. Complete answer to his fallacy is, it was at once enjoined even before it could take effect, by its terms, i. e. 13 days prior to Aug. 1, 1922, that it had no chance to be tried out. The Master, however, approves the Commission's ideas as adequate, and as fully intended to comply with the Statute and to give the Company a "just and reasonable rate of return," and "just and reasonable rates" as prescribed by the Statute. Indeed, he specifically finds (R. p. 72) that the contemplated net income of $344,998.36 is fully "adequate". In the connection used he certainly means this expression to be taken in the sense in which the Commission was using it, i. e. "adequate" to comply with the provision of the Statutes. Apparently, however, he wholly lost sight of the proper test in his reasoning and conclusion, applied to the Federal and State courts in a "*confiscation*" case. The test in the court, to avoid confiscation of property, is radically different from the test of a Commission or court as applied to the meaning of an "*ordinance contract*", or statute, requiring "just and reasonable" rate of return, or "just and reasonable" rates.

> Minneapolis vs. Rand, 285 Fed. supra, and the numerous Federal and State Decisions on the point cited at page 97 hereof.

7½% might produce a return "just and reasonable," where 5¾% or 6% or 6½% as a basis would be approved by all courts as not causing a confiscation of plaintiff's "*property.*" It is the "property" of a certain value of which the Company cannot be deprived. It is not a particular *income* that must be guaranteed. Income may be figured on various bases of annual return on the value of the "*property.*"

> Dayton-Goose Creek Ry. Co. vs. U. S., etc., 263 U. S. 456, supra.

The Master applied his reasoning to the 12 months of absolutely abnormal conditions above shown (3,300,000 less passengers than they averaged for the previous 3 years), as a test of the 5 1/3 cents average fare, (not allowed to operate) calculated by the Commission to be derived from its fixed schedule of rates.

As stated by Judge Farrington in the Reno case, and as is perfectly obvious, such a test, and such reasoning under such circumstances is wholly unfair and unjust to the public and must be rejected. First, destroy the schedule fixed by the Commission. Fix it so 3,330,000 less revenue passengers ride than ordinarily ride and 1,862,816 less than in the immediate previous year (also one of depression and slump in Duluth). Then when such extraordinary condition has been produced use the 5 1/3 cent average fare approved by the Commission and figure for result. This is reasoning in a vicious circle. It is a mere begging of the whole question at issue. It is throwing the patient into "fits," in order to get a certain result.

Is it any wonder that the result should turn out as the Master made it (R. p. 717 Record), viz., a result of gross revenue of $1,407,594.62 only, instead of the $1,460,834.10, as the Commission calculated? Or a shortage on its hopes of $52,879.48? Such method of reasoning is wholly inapt and unfair; for it is based solely on extraordinary and abnormal conditions; and where no practical and fair test of the legislative rates has been had, or was possible.

Yet, *even taking the result thus reached by the Master, and followed by the Court, it is submitted that when properly tested by other relevant facts, it still reaches a net income sufficient to withstand attack as being "confiscation of the property of the plaintiff."!*

The Master's said calculation left $1,407,954.62 as gross revenue, or $52,879.48 below the Commission's estimate of

Gross Revenue under its schedule. Now put this (R. 717) to the test of other relevant facts, viz.,		$1,407,954.52
From this deduct *proper* yearly operating costs, exclusive of taxes (as above)		$986,668.07
Net income exclusive of taxes		$421,286.45
Deduct State taxes (R. 721)		81,351.29
		$339,935.16
Now ascertain and deduct Federal Income tax	$339.935.16	
Deduct bond interest	125,994.10	
	$213,941.06	
12½% on this is		25,672.91
Net income		$314,262.15

This is on the *Master's basis at page 717, R.*

This does indeed fall short of the "just and reasonable" statutory estimate of the Commission by approximately $30,000.

But we are dealing here, not with a "just and reasonable" rate, but with a return that is *confiscatory of the plaintiff's property,* under the Federal Constitution.

The said net return of $314,262.15 *exceeds 6.8% on the value found* by the Master and Commission. 6% is $276,000.

Even on the Master's erroneous basis of revenue passengers above used with proper operating costs it is thus demonstrated that the $314,262.15 will give a net income of $15,262.15 *in excess of a 6½% return* on the full valuation. It is exactly 6.8% on the valuation approved. If a 6½% return or *6.8%* is

not confiscatory, *then the Master's own findings conclusively demonstrate that the plaintiff's case fails on proper operating costs;* that his recommendation fails; and that injunction should be denied. Especially so, if his *valuation* is too high! Using the trial court's valuation of $5,009,510, makes little difference in results, a difference not at all material.

The Commission had indeed, as found by the Master (R. p. 716 Revenue), *estimated* that under conditions existing in Duluth 2/3rds in number of the passengers would ride for 5 cents (5 tickets for 25 cents, and that 1/3rd would pay cash, i. e. their estimate provided for an average fare of 5 1/3c (Record p. 568, 569, 575-576, 577, 684). *This judgment of an impartial tribunal is supported by facts and by testimony.* If the 12 months ending July 31, 1923, throws light on *"operating costs", it also throws light on the percentage of those paying cash in Duluth and those who have bought tickets.* To be sure the tickets were 5 for *30 cents with contingent rebate of 5 cents,* as provided by amendment to interlocutory injunction, i. e. it was a contingent 5 cent fare purchase.

The undisputed evidence is that far the greater bulk of riders paid the cash fare of 6 cents. The percentage is about 70% paying cash and 30% buying tickets. In July 1923, 22.16% only were buying the tickets and 77.84% were paying cash 6c (Record p. 281, Warren).

These facts tend to corroborate the Commission's estimates and to overthrow the pessimistic and extravagant theory of the plaintiff on the point.

The Court will not fail to note the undisputed testimony of Mr. McWethy in reference to this point, and to the showing in 72 cities of the United States (Record pp. 684, 683; and pages 557, 558, 559, 583, 575-579 Commission's Ex. EE, original in files).

The average number of passengers in the 72 cities who pay cash is the 33.95% while the average number buying tickets at a

net less rate, not only at 5 cents, but every variety of rate and combination, is 66.41% (Record p. 684 at top, McWethy).

This evidence is a direct, persuasive and convincing basis to support the views of the Commission as to results of an average 5 1/3 cent fare under its schedule. *It is not here a case of mere lack of evidence, to support the order attacked.*

It is thus affirmatively supported by positive evidence. It is attacked merely by speculation and biased estimate of the Vice-president of the Company. As against the average showing of the 72 cities (see blueprint, Commission's Ex. EE, in files) under all combinations of cash and ticket rates, plaintiff produces one instance only, that of Columbus, Ohio, to support its extravagent speculations.

This is referred to by the Master at R. page 716. He says of it: "This estimate is probably excessive, but in the absence of a practical and fair test any estimate must be more or less conjectural," Among the 72 cities Columbus was one of two that has a 6 cent cash fare and 5 tickets for 25 cents like Duluth. Marion, Ohio, however, is another of similar schedule. (See Blueprint Exhibit Com's EE. on file). Those who paid cash in Marion were *36.8%* of the total. Those who bought tickets were *63.2%*. (Record p. 575). It chances to be less in Columbus. No similarity of general conditions to those in Duluth were shown to exist. Its split is unlike that of Marion. Why not adopt Marion's record in place of that of Columbus? It is all conjectural as to what the actual result in Duluth would have been if tried, and no trial was permitted. No fixed rule exists under all curcumstances (McWethy p. 576 at top). *It was the considered judgment of the Commission that the average result in the principal cities of the United States was a safe guide.* It is the sworn opinion of the Statistician and Engineer of the Commission, Mr. McWethy, that such a percentage would approximately have accrued in Duluth. He says:

"We believe that with this data at hand, it establishes, so far as it can be established, that the commission's estimate of 33 1/3 split for cash fares, and 66 2/3rds% for tickets in Duluth, *is a fair and reasonable estimate.*" (R. p. 576 at top).

It was the record in Marion, Ohio, on the same schedule. It is the average split under all kinds of schedules in 72 cities. Nothing but conjecture is advanced against this estimate and such considered judgment of the tribunal charged with the statutory duty, of fixing rates. It is peculiarly a case for the application of the rule of the United States Supreme Court that a legislative rate cannot be set aside and enjoined on conjecture, nor in any but a clear, a very clear case of confiscation; and that if "just or reasonable doubt" exists, the courts will not interfere until the rates have been tried. In his recommendation, the Master, while admitting necessity for estimate and mere conjecture seems not to have followed the guidemarks so laid down. He fails to give effect, on the controlling question of "Gross Revenues," to the presumptions in favor of the untried rates. He failed to properly appreciate the means of information and the considered judgment of the Commission and their manifest fairmindedness. And the trial court likewise so failed.

The Master said:

"Any estimate must be more or less conjectural; the tests, however, are sufficient to demonstrate that the Commission's estimates were erroneous and distinguished the showing here from that made in Georgia case, 43 S. C. R. 680." (Report p. 718, i. e. 262 U. S. 625).

It is respectfully submitted that such statement on its very face puts plaintiff's case in a class requiring dismissal "without prejudice."

But when the Master's apparent basis for said statement is searched for, it leads to nothing but mere estimates based concededly on conjectures; and on conditions clearly shown to be extraordinary and wholly abnormal, and, so, improper to be used, in absence of a proper test of experience, before overthrow of the Commission's order as void.

Paraphrasing the language of the United States Supreme Court in the Georgia Case and here applying it, it would read:

> "In making these changes the Commission fixed a rate which it estimated would permit the company to earn a return of 7½% on the fair value of the property. Each change of rate was made upon careful consideration. If there was error it was error in prophecy or error in judgment in passing upon the evidence. We cannot say that the evidence compels a conviction that the rate would prove inadequate, much less "confiscatory".

Lastly, (Points No. 14 and 15 supra). The experience of the 12 months ending July 31, 1923 brought to light another significant, even controlling fact, strongly supporting the Commission's order, and even showing that its own estimates were too low and conservative; and that its estimate ought to have been *28,262,188 instead of 27,030,000.* Such result would have produced better than a net return of 8%, with 2½% additional for annual depreciation.

It is respectfully submitted that the undisputed evidence requires a conclusion that at least *1,015,272 more revenue passengers used the street cars in the said 12 months period, than in 1921,* IN ATTENDANCE UPON SPECIAL ENTERTAINMENTS, THEATERS, CONCERTS, BALL GAMES, CONVENTIONS, ETC., UPON CARS NOT OPERATING ON "REGULAR SCHEDULES," BUT ON CARS PERFORMING WHAT WAS ALWAYS KNOWN AND PERMITTED AS "SPECIAL" OR "EXTRA" SERVICE.

general business activity and resulting general prosperity besides the marked increase in population. There was less exacting economy, as compared with the industrial slump, closing of plants, and great extent of unemployment and general depression of the year 1921. There was increased freedom of expenditure and greater use and demand for such special entertainments especially in the evening.

The situation is shown that 126,909 more car miles were called for and used for this special and *irregular* service than in 1921.

The "regular" or legal prescribed schedule, as fixed by the City Council was the same in both years, and is still the same. It has not been changed by the Council which has exclusive right to change it (Sec. 4, Brooks-Coleman Law).

The Master finds that 253,207 more car miles were run in the 12 months than in 1921 (p. 719 Subdivision a). 199,090 of these car miles, in excess of those in 1921, is positively explained and identified by the Manager of the Company as being exclusively used as follows (Record p. 659-660, 655): When people go on *regular* schedule to entertainments involving assembly of great numbers of people, from which they are to be returned, the conductors notify the Company's office of the numbers brought. Estimates are then made of the required number of cars to carry such people home, and they are supplied. They are often in waiting to be refilled by the people coming from those assemblies. This is called "special" or "extra" service, as distinguished from the fixed schedules. The practice is well known and well understood.

The number of 1,015,272 revenue passengers above mentioned is reached by dividing the total number of passengers carried in the year by the number of car miles operated in the year. This gives the number of revenue passengers for each car mile. In 1921 it was 8. 3,283,232 (car miles 1921 (R. p. 654

This result is accounted for by improved conditions of employment, resumption and enlargement of industrial plants, at top) divided into 27,246,916 (number revenue passengers 1921, Co's Ex. 35 in files) gives 8 plus.

Now multiplying 126,909 by 8 gives 1,015,272 (number of revenue passengers). It is perfectly evident also, as common experience and observation shows, that such cars are packed, and standing room is scarce; whereas it is not so much so on the "regular" fixed times of running.

This fact is pursuasive, also, that *more than 8 passengers to the car mile* are carried in such *special* service cars. So that the above estimate of 1,015,272 carried in such cars in said 12 months more than in like service in 1921 is really too conservative. It should be considered as larger.

If, in reply to this, it is said that such assemblies are partially served by cars on "regular" schedule time; that some of the overflow is taken on by cars coming upon fixed schedule, the answer to it is that such also was the case in 1921. But, notwithstanding similarity of these conditions in the two said years, yet, the increased demands required 126,909 more car miles than in 1921; and this means that not less than 1,015,-272 more revenue passengers were carried in said 12 months in such special months in such special runs than in 1921. It is confidently submitted that no other legitimate conclusion than this can be reached. The facts are shown by undisputed testimony. Discussion is challenged on this point.

Where does this lead to?

In 1921 (a year of depression) 27,246,916 revenue passengers were caried, Co.'s Ex. 35, in files. The said 12 months, on the contrary was a period of general prosperity, resumption and enlargements of industrial plants and little unemployment and the population was constantly increasing. Is it not reason-

able then, to suppose, if the option of the people to ride for 5 cents had not been destroyed, that at least as many as in 1921, would have ridden on the fixed and regular schedule? It is not only reasonable, but it is morally and mathematically certain that the number would not have been less. Such is McWethy's sworn stated o4pinion (Record 557, 558, 559).

Take this number then, 27,246,916, and add to it the number of 1,015,272 in excess of those in 1921, *who attended those entertainments* and the *total is 28,262,188!* Is this not a certainty? Indeed, it does not reach the average number carried in the three previous years 1919, 1920, 1921, which was 28,702,-571 (Warren Record p. 310, answering Master's question).

It falls short of such average by 443,383. What are the reasonable probabilities? In this "growing and progresive city whose topography gives a comparatively heavy street railway traffic," in the Master's language, is it unreasonable to claim that in 1924, the same number would on like rate have been, or be, carried *as was the average of those three years?*

At least, was there any "clear" evidence, is there any "certainty" that such would not be the result? Proper burden of proof, proper proof of confiscation, requires some clear and satisfactory evidence to overcome such facts as these Plaintiff does not furnish it.

28,262,188 at 5 1/3 cents average fare and proper operating expenses would give result as follows:

28,262,188x5 1/3 cents equals	$1,507,316.69
Add other revenue (Master's Rep. R. 717)	15,202.62
	$1,522,519.31
Deduct *proper* operating expenses as per pages 86-103 hereof	986,668.07
	$535,851.24

Deduct State taxes as per Master (R. 721)		81,351.29
		$454,499.95
Deduct Federal Tax found as follows	$454,499.95	
Deduct Interest on bonds as per Master's (R. 721)	125,994.10	
	$328,505.85	
12½% of this is Federal Income Tax	$39,420.69	39,420.69
Net Income is		*$415,079.26*

It is respectfully submitted that under operation of the Commission's rate if allowed to operate under normal conditions and fair costs, the annual net income of the plaintiff would not have been less than such figure, *$415,079.26.*

It is 9% on the Commission's valuation. When depreciation annuity of 2½% is added it reaches *11½%.*

It is 8.28% of the trial court's valuation of $5,009,510, or with 2½% annual depreciation 9.78% thereon!

In the Geary case, 244 U. S. supra, the United States Supreme Court said, assuming "fair valuation and fair operating costs":

> " It is *obvious* that 6½% of return above depreciation charges is not confiscatory."

In the recent Dayton-Goose Creek Ry. case, supra, it reached the same net result.

Let us apply this test to the plaintiff's claims and to the Master's valuation.

6½% on *$5,009,510* equals $325,618.15. The above table showing net return of $415,079.26 (figured on a reasonable basis) exceeds such result by $89,461.11.

No legislative rates could be set aside on such a showing.

6½% on a valuation of $4,600,000 is $299,000; or *$116,079.26 less than would reasonably have* accrued to the Company under said fair table, viz., $415,079.26.

6½% on the Commission's and Master's valuation thus *escapes* charge of confiscation with a leeway for safety of not less than $116,079.26.

But, as shown, it cannot be successfully claimed by plaintiff that *6%* is confiscatory.

6% on $4,599,978.22 is $276,000.

6% on $5,009,510 is $300,570.60.

The return would exceed this by $114,508.66.

Yet 5¾% is held to be a reasonable rate of return on *$18,000,000,000* of railroad property under rules of the Interstate Commerce Commission.

Thus by all tests, the Commission's order is not properly subject to attack as confiscatory and void; and the decree should be reversed, at least "without prejudice" for a fair test of the legislative schedule fixed.

Respectfully submitted,

JOHN B. RICHARDS,

City Attorney of Duluth and
Attorney for City of Duluth.

Sept. 30, 1926.

APPENDIX

MINNESOTA STATUTES RELATING TO APPEALS FROM ORDERS OF RAILROAD AND WAREHOUSE COMMISSION

Sections 4650-4651, General Statutes, 1923.
General Statutes, 1913, Sections 4191-4192.

4650. Proceedure for appeals to district court from orders of Railroad and Warehouse Commission.—Any party to a proceeding before the commission, or any party affected by any order thereof, or the State of Minnesota, by the attorney general, may appeal therefrom to the district court of the county in which the complainants, or a majority of them, reside, or in case none of them reside in the state, or in a proceeding commenced by the commission on its own motion without complaint, to the district court of one of the counties in which the order of the commission requires a service to be performed or an act to be done or not to be done by the carrier or warehouseman; or in case of train service, to the district court of one of the counties through which the train runs, at any time within thirty days after service of a copy of such order on the parties of record, as in this charter provided, by service of a written notice of appeal on said commission, or on its secretary. Upon service of said notice of appeal, said commission, by its secretary, shall forthwith file, with the clerk of said district court to which said appeal is taken, a certified copy of the order appealed from, together with findings of fact on which the same is based in case appeals are taken to the district court of more than one county, they shall be consolidated and tried in the district court of the county to which the first appeal was taken. (R. L. Chapter 4191, amended '07 c. 167 Chapter 1; '17 c. 291 Chapter 1) *(4191)*.

4651. Proceedings on appeal—Orders not appealed from—The person serving such notice of appeal shall, within five days after the service thereof, file the same with proof of service, with the clerk of the court to which such appeal is taken; and thereupon said district court shall have jurisdiction over said appeal, and the same shall be entered upon the records of said district court and shall be tried therein according to the rules relating to the trial of civil actions, so far as the same are applicable. The complainant before the commission, if there was one (otherwise the State of Minnesota), shall be designated as complainant in the district court, and the carrier or warehouseman as defendant. No further pleadings than those filed before the commission shall be necessary. Such findings of fact shall be prima facie evidence of the matters therein stated, and the order shall be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant. If said court shall determine that the order appealed from is lawful and reasonable, it shall be affirmed and the order enforced as provided by law. If it shall be determined that the order is unlawful or unreasonable it shall be vacated and set aside. Such appeal shall not stay or supercede the order appealed from unless the court, upon an examination of said order, and the return made on said appeal, and after giving the respondent notice and opportunity to be heard, shall so direct. If such appeal is not taken, such order shall become final, and it shall thereupon be the duty of the carriers affected to adopt and publish the rates of classifications therein prescribed. And all orders heretofore made, from which no appeal was taken, as provided by law, shall be deemed to have been in full effect for all purposes from the time when the right to appeal from such order expired. *When no appeal is taken from an order, as herein provided, the parties affected by such order shall be deemed to have waived the right to have the merits of such controversy reviewed by a*

court, and there shall be no trial of the merits of re-examination of the facts of any controversy in which such order was made, by any district court to which application may be made for a writ to enforce the same. (R. L. Chapter 1972, amended '07 c. 167 Chapter 2) *(4192).*

Section 10 of the Brooks-Coleman Act, modifies the above in vital respects, and substitutes *new* provisions, as shown in Brief; and under it the statutes above printed, are to be used *"so far as the same are applicable"* (Sec. 10).

FILED
FEB 26 1927
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. 228.

THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, O. P. B. JACOBSON, ET AL., AND CITY OF DULUTH,

Appellants,

vs.

THE DULUTH STREET RAILWAY COMPANY,

Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

31493

BRIEF FOR APPELLEE.

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**(Decided in January, 1927, not yet officially reported.)

APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1926

No. 228.

THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, O. P. B. JACOBSON, ET AL., AND CITY OF DULUTH,

Appellants,

vs.

THE DULUTH STREET RAILWAY COMPANY,

Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

31493

BRIEF FOR APPELLEE.

STATEMENT

In this brief the appellee will sometimes be called the Company, the appellants other than the City of Duluth the Commission and appellant City of Duluth the City.

A brief statement seems advisable.

In 1921 a number of companies were operating street railways in Minnesota under franchises having definite terms of existence, specifying maximum rates of fare and containing service regulations. In that year the legislature passed Chapter 278, Laws of 1921, which provided for a system of permits revocable at will by the legislature, the regulation of rates of fare by the Railroad and Warehouse Commission of the state and the regulation of service by the municipalities in which lines were operated.

Inasmuch as companies operating under franchises contractual in their nature could not be required to surrender these franchises and accept indeterminate permits revocable at the will of the legislature, nor to surrender the contract right to charge the maximum rate of fare therein specified, nor to submit to regulation by the municipalities contrary to that provided in such franchises, the law then enacted specifically provided in Section 2 thereof that any company desiring that the grant of its franchise should become an indeterminate permit and its operation become subject to the law might file with certain specified officers "a written declaration that it desires that such grant shall become an indeterminate permit and consent that the terms of this act shall apply to and govern the ownership, control, management, maintenance and operation of the street railway property of said street railway," and that upon the filing of such declaration and consent "such grant, subject to the provisions of this act shall become an indeterminate permit," etc.

The Company filed the necessary declaration and consent and thereafter, pursuant to the provisions of the act, upon the application of the Company dated May 13, 1921, the Railroad and Warehouse Commission, under date of July 13, 1922, made its order finding the value of appellee's property, what was a fair rate of return thereon and fixing a rate of fare to be charged of six cents cash, five rides for twenty-five cents.

The Company thereupon brought this action in the federal district court to enjoin the enforcement of said rate order as confiscatory. The statutory court of three judges directed the issuance of an interlocutory injunction on condition that the Company should charge not to exceed six cents cash and should sell tickets in blocks of five for thirty cents, with coupons for five cents redeemable by the Company upon conditions thereon stated.

The Commission and the City appealed to this court from the order granting the interlocutory injunction and later, without a hearing, that appeal was dismissed.

A Master was appointed, who heard the evidence and made his report. Upon final hearing the trial court upheld the report of the Master except as to value of the property, increased the value somewhat and entered final decree enjoining the enforcement of the Commission rate on condition that the Company charge not more than six cents for each passenger. The matter is here on appeal from that decree.

The Commission in its order found the value of the Company's property as of July 1, 1921, $4,593,000; additions July 1 to Dec. 31, 1921, $6,978.22, and total as of December 31, 1921 to be $4,599,978.22.

The Master found the same total value, although he made some changes in the value of specific items. The trial court found the value as of Dec. 31, 1921 $5,009,510.00.

On the hearing before the Commission and before the Master the inventory of the physical property of the Company was agreed upon and the unit prices of the physical property other than land were agreed upon on four different bases:

Basis No. 1; Pre-war prices prevailing in 1915.

Basis No. 2; Average prices ten years ending July 1, 1921.

Basis No. 3 Prices prevailing July 1, 1921.

Basis No. 4; Prices representing the actual investment of the company.

Prices under Basis No. 1 (pre-war) and Basis No. 4 (investment) were practically the same.

Prices under Basis No. 2 (1912-1921) were approximately 40% higher than under Nos. 1 and 4.

Prices under Basis No. 3 were practically 80% higher than under Nos. 1 and 4.

Upon the agreed inventory and unit prices the reproduction cost undepreciated of the physical property, except land, of the Company as of July 1, 1921, was:

Basis No.1 1915 Prices	Basis No. 2 10 year average	Basis No. 3 July 1, 1921 prices	Basis No.4 Investment
$3,488,161	$4,864,437	$6,308,966	$3,487,020

(Record p. 20)

In its order the Commission used the pre-war or investment basis for the physical property other than land and to give effect to increased prices then prevailing added 12.99+%. The Master used the same basis and on the same items and for the same purpose added 21.43+% and the court, using the same basis and excluding certain portions of the property which had been acquired during the period of high prices, added for the same purpose 40%.

The Company's evidence, which was not disputed, was that the prices prevailing at the time of the hearing before the Commission and before the Master were more than 50%

higher than the pre-war or investment basis prices. (Record p. 251).

The Commission in its order found an accrued depreciation upon the depreciable property of the company of 17% and this figure was accepted by the Master and the trial court.

The Commission found in its order that the reasonable annual rate of return upon the fair value of the property was 7½%. This rate of return was adopted by the Master and trial court.

The Commission and the City have both appealed. In their statement of points to be relied upon the Commission states but two:

1. That the Company had agreed that all matters in controversy in this action should be determined finally and conclusively and exclusively by the Railroad and Warehouse Commission and the state courts of Minnesota under and pursuant to the provisions of Chapter 278, Laws of Minnesota for 1921; and

2. That the action was premature for the reason that the Company had not taken the appeal to the state courts, provided for in the law.

The City, in its statement of points, copies the two points relied upon by the Commission and adds that the action was premature because no test of the Commission rate had been made and specifies other points as to value, expense of operation, rate of return and net revenue that would have been received under the Commission's rate.

In the brief the Commission and Attorney General raise a new question, that the court was without jurisdiction on the ground that confiscation under the Commission's order had not actually begun when the action was started.

SUMMARY OF ARGUMENT.

I.

The Court was not without jurisdiction because confiscation under the order had not actually begun but was only threatened.

The Commission had made its order which the Company alleged would confiscate its property if carried out, and the complaint alleged the Commission threatened to enforce the order.

> "One does not have to await the confirmation of threatened injuries to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U. S. 553.
>
> "It is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury where the damages would be insufficient or irreparable." *Vicksburg Waterworks Company v. Vicksburg* 185 U. S. 65.

II.

No contract exists which deprives the Company of the right to resort to the Federal Court to prevent confiscation of the Company's property.

(a) *Consent of the Company to be governed by the act did not create a contract of any kind.*

The Company was operating under a franchise, contractual in its nature, with a definite term and fixing maximum rates of fare. It could not, without its consent, be compelled to surrender its franchise and accept an indeterminate permit and give up its right to charge maximum fares fixed in its

franchise, and consent that its fares might be fixed by the agency of the Legislature. The "consent" of the Company to be brought under the operation of the law was therefore necessary.

The franchise under which the Company was operating expressly provided that upon its acceptance it should become a contract. The law, under which it consented to be governed, negatives the idea of contract by providing that it may be repealed, modified or amended at any time, or all rights of the Company thereunder taken away without compensation.

(b) *If consent of the Company to be governed by the act be construed as contractual, still it cannot be construed as an agreement to waive any right to resort to the Federal Court.*

The act gives to the Commission "initial and exclusive power and authority * * * to fix and establish rates or fare * * * subject to the powers of the District Court in case of appeal thereto, as hereinafter provided."

The State Supreme Court in *City of Duluth v. Railroad & Warehouse Commission*, 209 N. W. 10, held that the proceedings before the District Court on appeal were judicial in their nature, saying: "We see nothing in Section 10 imposing legislative or administrative duties upon the court." The "powers of the district court" to which the "power and authority" of the Commission is subject, are judicial powers, and when the proceeding has reached the stage where judicial powers of the state court may be exercised the like powers of the Federal Court may also be exercised. No attempt was made in the law to prohibit the resort to the Federal Court.

(c) *If consent of the Company to be governed by the act be construed as creating a contract binding the Company not to resort to the Federal Court, such contract would be void.*

This question is settled beyond possibility of controversy by a line of decisions in this Court, beginning with *Home Insurance Company v. Morse*, 20 Wall. 455, and ending in 1922 with *Terral v. Burke Construction Company*, 257 U. S. 529.

In *Doyle v. Insurance Co.*, 94 *U. S.* 535, it was said:

> "Every man is entitled to resort to all the courts of the country to invoke the protection which all the laws and all the courts may afford him and he cannot barter away his freedom or his constitutional rights."

In *Harrison v. St. Louis & Santa Fe Ry. Co.*, 233 U. S. 18, the court said:

> "It may not be doubted that the judicial power of the United States as afforded by the constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action, which therefore the several states cannot by any exercise of any authority of any form, directly or indirectly, destroy, abridge, limit or render inefficacious."

The rule holding such agreements to be void as against public policy has been uniformly adopted by all courts wherever the question has arisen, as shown by the cases cited in the brief.

III.

The Action Was Not Premature.

(a) *No principle of comity or convenience prevented the Company from bringing this action in the Federal Court as soon as the Commission's rate order was made.*

The order of the Commission fixing rates of fare was the

final legislative act, and the judicial stage was then reached. In *City of Duluth v. Railroad & Warehouse Commission*, 209 N. W. 10, the Supreme Court of Minnesota said, referring to the section of the law authorizing appeal to the District Court: "We see nothing in Section 10 imposing legislative or administrative duties upon the Court."

Northwestern Bell Telephone Company v. Hilton, 274 Fed. 384, 4 Fed. 2d, 545.

Bacon v. Rutland Railroad Company, 232 U. S. 134.

Prendergast v. Telephone Co., 262 U. S. 43.

Detroit & Mackinac Railway Company v. Michigan Railroad Commission, 235 U. S. 402.

The action was not premature, even if the duties of the Court on appeal under the provisions of Section 10 be considered as legislative and not judicial. "Rules of comity or convenience must give way to constitutional rights." *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290. "Under such circumstances comity yields to constitutional right and the fact that the procedure on appeal in the legislative fixing of rate has not been concluded will not prevent the Federal Court of equity from suspending the daily confiscation if it finds the case to justify it." *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196.

(b) *The action was not premature, because brought before testing the Commission rate.*

No test of the Commission rate was necessary. The Company was operating under a straight five cent fare when the law was passed, and its experience under that rate was a practical test of the Commission rate, six cents cash, five tickets for twenty-five cents, a five cent fare for everyone who cared to invest at any one time as much as twenty-five cents.

The Company established by its affidavits before the statutory court of three Judges and by its evidence before the Master that under such a rate more than 90% of the passengers could be expected to ride at the five cent rate.

In the argument on the issuance of the interlocutory injunction before the three Judges, Judge Sanborn, in delivering the opinion of the three Judges, said:

> "We are satisfied that this corporation has been deprived during the last six months of a part of its property and that the rate which has been prescribed by the Commission of six cents cash and five tickets for twenty-five cents will continue the deprivation until there is a radical change in the business of the Company."

The evidence before the Master showed the experience of the Company for one full year under a straight six cent fare, and the Master found that the Commission rate, if enforced, would be confiscatory. The trial court upheld this finding of the Master, and found that the Commission's order would, if enforced, result in confiscating the Company's property.

The evidence before the statutory court of three Judges, and later before the Master and the trial court, satisfied all of the requirements of the rules of this Court.

In the *Knoxville* case, this Court said that if the company chose to bring its action to enjoin the rate ordinance before testing it, it must be prepared to show to the *"satisfaction of the court"* that the ordinance, if enforced, would result in confiscation, and further, "it cannot be doubted that in a clear case of confiscation, it is the right and duty of the court to annul the law."

In the *Wilcox case*, this Court said that where the rate is so low upon any reasonable basis of valuation that "there

can be no just doubt as to its confiscatory nature," that there should be no hesitation in so deciding, and in "*enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate.*"

In the *Prendergast* case, 262 U. S. 43, there was no test of the rates which were enjoined, and this Court said: "*There was no necessity in the particular situation presented for any test period of the new rates.*"

IV.

Valuation.

(a) *Cost of financing was properly allowed.*

The actual cost of financing, in the sum of $89,075.00, was established and allowed, under the authority of *Ben Avon Borough v. Ohio Valley Water Co.*, 271 Pa. 346, and other cases cited in the main brief.

(b) *The amount added to reflect present day prices was not too high.*

The Commission took the agreed inventory of the physical property, except land, and applied to it the agreed unit prices prevailing before the war, and added to this amount 12.99+% to give effect to higher prices existing July 1, 1921, agreed to be approximately 80%. From the amount so obtained the Commission deducted accrued depreciation of 17% of the value of the depreciable property so found.

The Court, for the purpose of giving effect to the higher prices prevailing on July 1, 1921, added 40% to the pre-war prices as to all property of the Company shown to have been acquired before prices were affected by the war, and approved the Commission's finding as to the rate per cent of accrued depreciation.

The addition by the Court of only 40% to the reproduction cost, as measured by pre-war prices, of the property acquired by the Company before prices were affected by the war, was too low. By applying to the inventoried property the 1915 or pre-war prices as agreed upon, it was established that average prices for the ten years ending July 1, 1921 were aproximately 40% above the pre-war prices, and that the prices prevailing July 1 ,1921, the date at which the Commission fixed its valuation, were approximately 80% above the 1915 or pre-war prices. This Court held in the *Indianapolis Water Company* case, recently decided, that the average prices prevailing over the ten years ending with 1921 were too low to be used as a basis of reproduction cost for a valuation as of 1922. The evidence in this case shows that prices prevailing on July 1, 1921 were somewhat higher than those prevailing in 1922 and 1923.

V.

Operating Expenses.

(a) *Depreciation.*

While the Court found the value of the depreciable property higher than that found by the Commission, it did not increase the annual depreciation as fixed by the Commission. The Commission is not here criticizing the finding of the Court on that item, and the City's objection is based on the mistaken notion that the Commission applied its percentage rate of depreciation upon the property not subject to depreciation. We have demonstrated this mistake in our main brief.

(b) *The City objects to operating expenses caused by increased service without approval of the City having first been obtained to the increased service.*

The Master properly held that the approval of the City

was not necessary and the evidence conclusively shows that the increased service more than paid for itself, so that there was no increase in operating expenses due to the increased service.

(c) *The City makes some criticism of the allowance of attorneys' fees. This was legitimate expense properly charged to operating expense.*

(d) *The City complains as to certain operating expenses which were incurred and paid in connection with the rate proceeding; they were under the direct authority of the law.*

(e) and (f) *The City complains as to certain items of expense on the ground that they were abnormal. They were actually incurred during the trial year and were allowed by both the Master and the Court.*

VI.

Rate of Return.

The Commission, Master and the Court all agreed upon a rate of return of 7½%. The evidence fully supports this finding and would have supported a finding of 8%. A large number of citations are given where 8% or more was allowed by Commissions and Courts during the year 1922.

VII.

Income required and estimated revenue.

The Commission assumed 27,030,000 passengers would be carried annually. The Commission found that an annual increase of $95,000 in revenue was necessary above what would be produced by a five cent fare and assumed that that

would be produced by the passengers paying cash fare under its rate. If 27,030,000 passengers had ridden in one year, to produce this amount it would have been necessary that more than one-third of them pay the extra one cent. The evidence showed that less than 10% of the passengers could be expected to pay the six cent cash fare under the Commission rate. The trial court found that passenger revenue of $1,551,535.25 was required. At the average rate assumed by the Commission of five and one-third cents per passenger, this would have required more than 29,000,000 passengers, but the actual number of passengers carried during the first year after the Commission's order was 25,384,100, or approximately 2,000,000 fewer than the Commission estimated and approximately 4,000,000 fewer than necessary, even on the Commission's estimate of the number of passengers that would have paid the cash fare. On the basis furnished by the evidence of the percentage of passengers that would pay the cash fare, the deficiency would have been still greater.

VIII.

Conclusion.

The Court had jurisdiction; the action was not premature; the value found by the Court was too low; the rate of return as found by the Commission, Master and Trial Court was not too high; the operating expenses as found by the Master and approved by the Court were supported by the evidence; the rate of fare, six cents cash, and five rides for twenty-five cents, was entirely insufficient, and if put into effect would have confiscated the Company's property.

The decree was right and should be affirmed.

IX.

Supplemental Statement and Brief.

On October 4, 1926, the Commission made its order, effective October 15 ,1926, in which it increased the value of the property to substantially that found by the Court, confirmed its earlier finding as to the 7½% being a reasonable rate of return, and found that owing to the increasing use of the automobile the number of passengers carried by the Company had decreased to such an extent that at the straight six cent fare, the Company would have a deficit for the year 1926 below what it was entitled to receive of $247,526.00.

If there was any doubt remaining in anybody's mind as to the Commission's rate order of six cents cash and five rides for twenty-five cents being confiscatory, that doubt was removed by the later order of the Commission itself finding a higher value for the property, recognizing its error in estimating the number of passengers who would ride, and determining that a rate of fare even higher than that permitted to be charged by the decree of the Court was reasonable and proper.

ARGUMENT.

This appeal involves the validity of the rate order made by the Commission on July 13, 1922, of six cents cash and five rides for twenty-five cents.

There are certain preliminary questions to be discussed before reaching the question of the value of the property, rate of return, results from operation and rate of fare.

The Attorney General and the Commission by their brief raise but two questions (1) that the court was without jurisdiction when the action was begun and (2) that the action was premature.

The first point, of lack of jurisdiction, appears in this brief for the first time in this proceeding. It was nowhere mentioned during the proceedings in the court below and was not mentioned in the statement of points to be relied upon, filed pursuant to Paragraph 9 of Rule 11 of the court. The point is not made by the City either in its designation of points to be relied upon nor in its brief but we assume that, it being the claim of lack of jurisdiction made by the Attorney General of the state, the court will notice it even though it has not been brought before the court in the manner required by the rules.

I.

The Court was not without Jurisdiction Because Confiscation under the Order had not Actually Begun but was only Threatened.

The order of the Commission was made July 13, 1922, effective August 1, 1922. This action was started July 18, 1922. The complaint alleged the making of the order, that if enforced it would subject the Company to great and irreparable

loss, damage, expense and inconvenience, would confiscate its property and deprive it of its property and rights without due process of law and deny to it due protection of the law, in violation of the 14th amendment to the federal constitution and that the defendants, being the Commission and its individual members, and the Attorney General were "threatening to enforce and are about to enforce said order against this complainant in manners and ways unknown to this complainant." (Record p. 9)

The point now made, as we understand it, is that because confiscation had not actually begun the court is without jurisdiction to enjoin it. This point certainly has the distinction of being novel. We do not recall ever having seen it made before. If sound, then this court has acted without jurisdiction in many cases where it has considered the matter of an injunction as a preventive remedy.

In many of the cases relied upon by the City as showing the necessity for test of the Commission's rate the action was brought to test the validity of the rate before it was put in force and therefore before actual confiscation thereunder had begun. In most cases where an injunction is asked for, it is not to stop injury then being done but to prevent irreparable injury then threatened. The writ of injunction came into existence to prevent injury where no adequate remedy could be given at law and in all cases where an injunction is asked for to prevent the doing of a single act the remedy would be entirely useless if it could not be sought until the act of injury had begun.

On Pages 16 and 17 of the brief the Attorney General apparently relies upon the case of *Henderson Water Co. v. Commission*, 269 U. S. 278, and says on Page 17 of the brief that this suit was not merely premature and capable of being held in abeyance like the *Prentis* case but like the *Henderson Water Co.* case is so premature that jurisdiction did not exist at all on the day the suit was commenced. We think it would be

somewhat of a surprise to this court to realize that it did not have jurisdiction in the *Henderson Water Company* case. We find nothing in that decision to give countenance to such a view.

In *Vicksburg Water Works v. Vicksburg*, 185 U. S. 65, the court reversed the judgment of the lower court, dismissing the suit for lack of jurisdiction. The company claimed a contract with the city for the continued supply of water. The city threatened to deny liability under this contract and to refuse to pay compensation provided for in that contract. The bill asked for an injunction to restrain the city from assuming to abrogate and take away the franchises and contract rights of the complainant and from attempting to coerce the company to sell its works to the city for an inadequate price. After disposing of certain objections to the bill this court said:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

In the case at bar the complaint alleged the making of the order by the Commission, that if enforced it would confiscate plaintiff's property and that the defendants were threatening

to enforce it. Every element present in the *Vicksburg* case is present in the case at bar and the *Vicksburg* case is an authority on all fours for the claim of jurisdiction in this suit.

In *Raymond v. Chicago, etc.*, 207 U. S. 20, action was brought to enjoin proceedings for the collection of taxes upon the ground that the assessment was made in violation of the 14th amendment and if enforced would result in taking appellee's property without due process of law. In granting the injunction in the decree appealed from the court pointed out that the assessment had been made on a basis which if enforced would deny the complainants the equal protection of the law and said:

> "We have no doubt that complainants may entrench themselves against this invasion by a writ of injunction. One of the primary grounds of equity jurisdiction is to reach cases involving mistake, fraud or coercion, and the relief necessary to their correction. The cases under consideration come clearly within this jurisdiction. It is incomprehensible that the complainants may not avert this threatened invasion of their rights—that they must first yield and then turn prosecutors in a court of law to recover their loss. The fundamental guarantees of the constitution must not be thus emasculated."

And this judgment was affirmed by this court.

In *North America Cold Storage Co. v. Chicago*, 211 U. S. 306, jurisdiction was founded on the allegation that the ordinance in question violated the 14th amendment because it provided for no notice to the complainant before seizure and destruction of food. No seizure had been made but was only threatened.

In *So. Covington v. Newport*, 259 U. S. 97, the action was brought in the Federal Court of Kentucky to enjoin the enforcement of a municipal resolution directing the removal of

a high tension wire constructed by a street railway, light and power company. The bill alleged the adoption of the resolution by the Board of Commissioners of the defendant city, declaring the electric wire dangerous to life and property and directing the removal of the wires not later than a certain date and alleged that unless restrained by the court defendant would remove the wire, causing plaintiff irreparable injury. The trial court dismissed the bill for lack of jurisdiction. Its action was reversed by this court, saying:

> "Where, as here, the jurisdiction of a district court has been invoked on the sole ground that the cause involves a federal question, and this is duly challenged, the issue must be determined by considering the allegations of the bill. If they distinctly disclose a real, substantial question of that nature, there is jurisdiction; otherwise there is none. * * *
>
> "Here it is affirmatively alleged that the city intends forcibly to remove and destroy appellants' property and thereby violate their constitutional rights. This presented a substantial claim under the constitution."

In *City Railway Co. v. Citizens Street Railroad Co.*, 166 U. S. 557, the action was brought by the railway company to enjoin the railroad company from interrupting or disturbing complainant in the construction, operation and maintenance of a street car system in the city of Indianapolis. The plaintiff claimed a contract with the city giving it the right to lay and operate street railway lines in the city streets and providing that the city should not confer any privilege upon any one else that would conflict with the plaintiff's rights. The city made a grant which plaintiff claimed if carried out would substantially destroy the rights granted to plaintiff. Both parties were citizens of the same state and the question of jurisdiction was raised. In upholding the jurisdiction this court said:

> "All that is necessary to establish the jurisdiction of the court is to show that the complainant had or claimed in good faith to have a contract with the city which the latter had attempted to impair."

In *Mitchell v. Dakota Central Telephone Co.*, 246 U. S. 394, this court had under consideration an action brought to enjoin the enforcement of a municipal ordinance terminating the right of a telephone company to maintain and operate telephone system and requiring removal of its poles and wires from a city street. The question of jurisdiction was first passed upon and as to this the court said that the proposition needed but little comment and continued:

> "The company attacked the ordinance or resolution of the city requiring the company to remove its poles and wires from the streets as an impairment of the contract constituted by other ordinances, and hence invoked against the city the contract clause of the constitution of the United States, and also, on account of the asserted destruction of its property, urged in its protection the due process clause. The city combated both propositions.
> * * *
> "It will be seen, therefore, that the company invoked rights under the constitution of the United States, and the district court considered them to be substantial, not formal, and accordingly exercised jurisdiction."

The lower court issued the injunction as prayed for. This court, upon the construction which it placed upon the resolution of the city and of the rights of the company under one of the ordinances, reversed the action of the lower court but not on the ground of lack of jurisdiction.

In *Columbus Railroad & Power Co. v. Columbus*, 249 U. S. 399, the court had under consideration an action brought by the railway company to enjoin the city from enforcing rates

of fare contained in a franchise contractual in its nature. The trial court dismissed the bill for want of jurisdiction, saying that the nature of the threats made and the means to which it is expected the city will resort to enforce its threat are not stated or shown. This court held that the lower court was in error on this point, saying:

> "We are of opinion that there was jurisdiction in the district court to entertain the bill as it presented questions arising under the 14th amendment to the federal constitution not so wholly lacking in merit as to afford no basis of jurisdiction . Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court."

The court then proceeded to dispose of the case on the merits and decided against the company.

In *Waite v. Macy*, 246 U. S. 606, the court had under consideration an action brought to enjoin the Board of General Appraisers from applying an alleged illegal test to imported tea. The district court had dismissed the bill upon appeal, the circuit court of appeals had reversed the decree of the district court decreeing the injunction prayed for and its action was upheld by this court. In the course of its decision, which was upheld here, the circuit court of appeals said:

> "This is no academic construction of a statute in advance of its application; and we are dealing with a concrete case; the teas have been bought and brought here at large expense in reliance upon the statute; they have been once rejected, and unless the injunction be granted they will inevitably be again rejected, with the result that they must be removed from this country or destroyed. There is no ground for the contention that the application is premature, on the theory that non

constat what is shown the board may finally admit the teas; the record establishes the converse of this proposition. Time will be saved and loss reduced by now enjoining a threatened injury, if the action which is threatened is without authority of the law."

In *Prendergast v. New York Telephone Co.*, 262 U. S. 43, the order of the Commission was made on March 3, 1922, effective April 1, 1922. The action was brought on March 29, 1922, before the order became effective. The injunction was issued on June 12, 1922, and the order of the court issuing the injunction was upheld by this court. No question as to jurisdiction was raised.

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, the Commission's order was effective May 1, 1906, and the court granted an interlocutory injunction. Appeal was taken to this court and question of jurisdiction raised. This court, in upholding the jurisdiction, said of the case:

"It involves the constitutionality with reference to the federal constitution, of two acts of the legislature of New York, and it is one over which the circuit court undoubtedly had jurisdiction under the act of Congress, and its action in taking and hearing the case cannot be the subject of proper criticism."

In *Pennsylvania v. West Virginia*, 262 U. S. 553, the court had under consideration the validity of a statute of West Virginia designed to reserve natural gas produced in that state for the use of its own citizens. The action was an original action in this court brought by the states of Pennsylvania and Ohio. In the course of its opinion the court said:

"The second question is whether the suits were brought prematurely. They were brought a few days af-

> ter the West Virginia act went into force. No order under it had been made by the public service commission, nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant states apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

Injunction is a preventive remedy and will be issued to prevent a threatened irreparable injury. It is not necessary to wait until the injury has occurred for then it would be too late. The complaint here alleged the making of the order, that if enforced it would violate plaintiff's constitutional rights to its irreparable injury and that enforcement was threatened. These allegations made in good faith—upheld by the court below—gave jurisdiction.

II.

No Contract Exists Which Deprives the Company of the Right to Resort to the Federal Court to Prevent Confiscation of the Company's Property.

At the time of the passage of Chapter 278, Laws of Minnesota 1921, the company was operating under a franchise contract contained in Chapter 200, Special Laws of Minnesota, 1881. This franchise contained a provision in Section 8 which limited the fare between points within the then Village of Duluth to five cents. Other language in this section indicated that it was not intended that the five cent fare should cover more than a three mile ride, but by later legislation the village became a city and other territory was added so that in 1921 passengers were being carried throughout the city, a distance

in some cases of more than 15 miles, for a single fare of five cents.

Section 16 of said Chapter 200 contained a provision for filing with the Secretary of State and with the Recorder of the Village

> "a written acceptance of the grants hereinabove made with the conditions, regulations and limitations above expressed, signed by the President and Secretary of said company, and when so accepted the same shall operate as a contract between the state and village and said company."

Such acceptance was filed and the franchise thus by its terms became a contract which was binding upon the state, the village and the company.

In *State v. Holm*, 138 Minn. 281, decided in 1917, the court upheld a law passed in 1915 which permitted telephone companies to surrender franchises and receive in lieu thereof indeterminate permits to occupy the streets of the municipalities, holding that the contract rights of the municipalities under such franchises might be surrendered by the legislature.

It is familiar law, requiring no citation of authority, that the contract right of the Company under such franchise could not be impaired or taken away by legislative act without its consent.

The solution, therefore, where the state desired to change the status of the company's rights from franchises with definite limits of time and fixed maximum rates of fare to indeterminate permits subject to legislative control and rates of fare fixed by a commission, was that adopted; a regulatory law giving to the companies the option of continuing under their franchises or of surrendering them and coming under the provisions of the regulatory law.

This plan was followed, Chapter 278 was enacted and the companies desiring to come under the provisions of the law filed the consent required and thereby automatically became subject to its provisions.

The point is now made by both the Commission and the City that by filing its declaration that it desired the grant in its old franchise to become an indeterminate permit and consenting that the terms of the act should apply to and govern the ownership, control, management, maintenance and operation of its property, the company bound itself by contract not to resort to the federal courts to enjoin the enforcement of confiscatory orders of the Commission. To that claim the company answers:

(a) Consent of the Company to be governed by the act did not create a contract of any kind;

(b) If consent of the Company to be governed by the act be construed as contractual, still it cannot be construed as an agreement to waive any right to resort to the Federal Court; and

(c) If consent of the Company to be governed by the act be construed as creating a contract binding the company not to resort to the Federal Court, such contract would be void.

(a)

Consent of the Company to be governed by the act did not create a Contract of any kind.

This consent was only necessary because by reason of the old contract franchise in existence the legislature could not, without such consent, require the Company to come under the provisions of the act, insofar as such provisions are in conflict with the contract provisions of the franchise. There is nothing in the language of the act that indicates any intention

on the part of the legislature to give to the Company any contract rights under the act. In face the act itself, in the plainest language, negatives any thought of contract obligations. By Section 14 it is provided:

> "The state reserves the right at any future time to modify, amend or repeal this act or any part thereof or to cancel or modify any indeterminate permit arising or existing under this act. * * * No such street railway shall be entitled to any damages or compensation in the event of any modification, amendment or repeal of this act or the cancellation or modification of any permit, grant or franchise above referred to."

By its consent to be governed by the act the Company placed itself unreservedly under the regulation and control of the legislature. Its right to protection now rests in the sense of fairness of the legislature and the rights guaranteed to it by both state and federal constitutions. The Company consented "that the terms of this act shall apply to and govern the ownership, control, management, maintenance and operation of the street railway property of said street railways." By so doing it waived its contract rights under its original franchise and placed itself unreservedly under the regulation and control of the state, but in so doing it acquired no vested rights of any nature. Every provision of the act could have been repealed or modified in any form which the legislature saw fit on the day following the filing of the Company's consent or at any time thereafter.

The provisions of the act contain no word of contract. There is nothing in the nature of an agreement. There is no permanency about any right which the company acquired. The statute did not even require the company to accept the act. It was only obliged to state that it desired that the grant of its old franchise should become an indeterminate permit and

"consent" that the terms of the act should apply to and govern the ownership, control, management, maintenance and operation of its property. It surrendered a contract. It consented to be governed by this act, subject to its amendment or repeal. No case has been cited by counsel for either the City or the Commission,—and we have seen none,—which holds that language such as contained in this act constitutes a contract of any nature giving any contract or vested rights.

The old franchise under which the Company was operating (Ch. 200, Sp. Laws 1881) specifically provided that when the grants contained therein were accepted *"the same shall operate as a contract"*, while the law now under consideration with equally specific language, in Section 14, negatives the idea of a contract by reserving the right, without compensation to the Company, to *"modify, amend or repeal this act or any part thereof or to cancel or modify any indeterminate permit arising or existing under this act."*

This question was argued by the Deputy Attorney General of the state, acting on behalf of the Commission, in *City of Duluth v. Railroad and Warehouse Commission*, 209 N. W. 10, and in response to that argument the court said:

> "Since, under a provision in the act, a street railway company before it can become subject thereto must file its consent, it is very ably and forcibly argued by the Deputy Attorney General, appearing for the Commission, that the company thereby enters a contract with the city binding itself to accept whatever rate may be fixed in accordance with the procedure prescribed by the act. That proposition is not in the case. Holding Section 10 constitutional as we do, this suit to enjoin the valuation of after-acquired property of the street railway company, as expressly provided by the act, was properly dismissed, even though the company stand in no other relation to this act than to any general legislative act governing the procedure for rate fixing. Some of the existing street railway companies held franchises for a term of years

with a rate of fare fixed therein. No doubt the provision for filing consent was inserted in the law so as to enable such companies to terminate that relation."

While the argument of the Deputy Attorney General was addressed largely to the thought that the law should be so construed as to prevent the railway company from resorting to the Federal Court and while, as the Supreme Court of Minnesota states, the question of contract was not in the case, in the paragraph immediately preceding, it effectually disposed of the thought which underlay the whole argument the Deputy Attorney General was making, in these words:

> "We are not concerned with the effect the federal courts will give to rates fixed and reviewed as provided in the Brooks-Coleman Act. It is the duty of this court to see that the due process clause of the federal constitution is not violated as well as the same clause in the state constitution, but while so doing we must recognize that our construction and application of a state rate fixing statute does in no manner hinder or preclude the federal courts from inquiring into and determining whether or not the procedure under such statute deprives the parties concerned of property rights in violation of the due process clause of the federal constitution."

(b)

If consent to be governed by the act be construed as in any sense contractual, still there is no way to spell out of it or read into it any agreement not to resort to the Federal Court.

The Company was operating under a franchise contractual in its nature, having a definite term to run and with a fixed right to charge rates therein prescribed. It could not, without its consent, be compelled to surrender this franchise

and waive its right to charge these rates, and for that reason and that only the law provided for the filing of a written declaration that it desired its grant with a definite term should become a permit with an indefinite term and a consent to be governed by the act.

The act then gave to the Commission the "initial and exclusive power and authority * * * to fix and establish rates of fare * * * subject to the powers of the district court in case of appeal thereto as hereinafter provided."

The Minnesota legislature, subject only to the provisions of the state constitution, may control proceedings before the Commission and before the state courts but it has no such power or authority with reference to the federal courts. Under the state constitution the legislature would have no power to delegate to the state court the right to fix and establish rates of fare. That is a legislative act and under the constitution cannot be performed by the courts, but the legislative act having been completed, *"the exclusive power and authority"* of the Commission to fix and establish rates of fare having been completely exercised, the question of the validity of the action of Commission in its exercise of that power becomes a judicial question and as such the manner of its submission to the state court is within the control of the legislature, and in providing for the submission of that judicial question to the state courts the legislature did not undertake to deny to the company the right to have that judicial question submitted to the Federal Court if it so desired.

It must be assumed that the legislature was fully aware that it had no power to prohibit the exercise by the Federal Court of its duties arising under the federal constitution and the acts of Congress. Nothing but the plainest language would warrant the assumption that the state legislature would attempt to accomplish any such result and there is not a syllable in this act which can be so construed. As a matter

of fact, this entire claim on the part of the City and the Commission was based upon the view of the City Attorney and of the Attorney General that the action of the state court under this law is legislative in its nature and that therefore, as the federal courts could exercise only judicial functions, they could not at this point take jurisdiction, but that contention, which was made by the attorneys for all of the appellants before the trial court has now been effectually disposed of by the decision of the state Supreme Court in the case of the *City v. Commission*, referred to above.

(c)

If consent of the Company to be governed by the act were construed as creating a contract binding the Company not to resort to the federal courts, such contract would be invalid.

This question seems to be settled beyond the possibility of controversy by a line of decisions in this court beginning in 1874 with *Home Insurance Company v. Morse*, 20 Wall. 455, and ending in 1922 with *Terral v. Burke Construction Company*, 257 U. S. 529.

In *Home Insurance Company v. Morse*, 87 U. S. 445, there was involved the validity of an agreement entered into by the insurance company, a foreign corporation, as required by the statute of Wisconsin in its aplication for license to transact business in Wisconsin. The statute required the foreign corporation making application for a license to sign a written agreement that it would not remove any action brought against it into the Federal Court.

An action was brought against the company in the state court. Disregarding its agreement, it took the necessary steps to remove the action into the Federal Court. The state court refused to recognize the removal and proceeded to

trial and judgment. The case was then brought by writ of error to this court, where the judgment of the Supreme Court of Wisconsin was reversed with instructions to grant the petition for removal. The precise question, therefore, determined in the action and by the judgment, was the invalidity of the agreement made by the company, as a condition to receiving its license, that it would not remove the action into the Federal Court. The language contained in the power of attorney signed by the company was:

> "And said company agrees that suits commenced in the state courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal Courts."

The court made an elaborate discussion of the whole question citing a large number of decisions from other courts beginning with *Nute v. Insurance Company*, 6 *Gray*, 174, and held that the agreement was void.

In *Doyle v. Continental Insurance Company*, 94 U. S. 535, the Wisconsin statute again came before the court. The statute, in addition to requiring agreement not to remove a case into the Federal Court, also contained a provision that in case the company violated its agreement its license should be revoked. The insurance company removed the case brought against it into the Federal Court and then brought an action against the Secretary of State to enjoin him from revoking its license.

This case did not, as did the other, involve the validity of the agreement but it did involve the question of the right of the state to revoke the license for the violation of the agreement. The court specifically approved the holding of the *Morse* case, that the agreement was void but held that the law, so far as it provided for the cancellation of the license,

was valid. As to the point decided in the *Morse* case it was said:

> "It was held on the general principles of law that although an individual may lawfully omit to exercise his right to transfer a particular case from the state courts to the federal courts and may do this as often as he thinks fit in each recurring case, he cannot bind himself in advance by an agreement which may be specifically enforced thus to forfeit his rights. This was upon the principle that every man is entitled to resort to all the courts of the country to invoke the protection which all the laws and all the courts may afford him and that he cannot barter away his freedom or his constitutional rights."

Three of the Justices dissented and in the dissenting opinion of Justice Bradley he said:

> "The argument used, that the greater always includes the less and therefore that if the state may exclude the appellees without any cause it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy or rob my neighbor of his property."

In *Barron v. Burnside*, 121 U. S. 186, the court considered the validity of the Iowa foreign corporation statute. This statute required the application for permit to contain a "stipulation that said permit shall be subject to each of the provisions of this act." and one of the provisions of the act was that if any such corporation should remove an action brought against it into the Federal Court it should forfeit the permit granted to it. Chicago & Northwestern Railroad Com-

pany, a foreign corporation, was operating in this state without a permit. One of its locomotive engineers was arrested, charged with knowingly operating his engine for the company and thus violating the act. The state court upheld the validity of the statute and the matter was brought to this court on a writ of error. This court reviewed the *Morse* and *Doyle* decisions involving the Wisconsin statute and then said:

> "In both of the cases referred to the foreign corporation had made an agreement not to remove into Federal Court suits to be brought against it in the state court. In the present case no such agreement has been made but the locomotive engineer was arrested for acting as such in the employment of the corporation because it had refused to stipulate that it will not remove into the Federal Court suits brought against it in the state court as a condition of obtaining a permit and consequently has not obtained such permit. Its right, equally with any individual citizen to remove into the Federal Court under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day, and the State of Iowa might as well pass a statute to deprive an individual citizen of another state of his right to remove such suits.
>
> "As the Iowa statute makes the right to a permit dependent upon the surrender by a foreign corporation of the privilege secured to it by the constitution and laws of the United States, the statute requiring the permit must be held to be void."

In *Southern Pacific Company v. Denton*, 146 U. S. 202, the court passed on the validity of the Texas foreign corporation law. The question was as to the jurisdiction of an action brought against the railway company in a district other than the residence of the plaintiff, as required by the judiciary act. Plaintiff contended that the defendant had consented to be

sued in any district within the state and had agreed that any removal of an action brought against it into the Federal Court should result in forfeiture of its permit, all as provided by the statute, which had been agreed to by the railway company, a Kentucky corporation. The court said:

> "But that statute requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender the right and privilege secured to it by the constitution and laws of the United States, was unconstitutional and void and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions." Citing the *Home Insurance Company* and *Barron v. Burnside* cases.

In *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, the court considered and upheld the Kentucky foreign corporation law. This statute did not require the company to sign an agreement in advance not to remove its suits, as in the Wisconsin law, nor did it contain any provision that the company, in applying for a license, should stipulate that the license was subject to the other provisions of the statute, as in the Iowa law considered in Barron v. Burnside, supra, and the Texas law in *Southern Pacific v. Denton*, supra, but did provide that if any company removed a suit into the Federal Court or brought an action against a citizen in the Federal Court the Commissioner should forthwith revoke the company's authority to do business in the state and the action before the court was one brought to enjoin the Commissioner from threatened revocation. The court analyzed the two cases involving the Wisconsin law and said, with reference to the agreement required by that statute:

> "This court held that the agreement was void inasmuch as, if carried out, it would oust federal courts of the jurisdiction given them by the constitution and statutes

of the United States. It was said that the statute of Wisconsin was an obstruction to the right of removal provided for by the constitution of the United States and the laws made in pursuance thereof, and that the agreement of the insurance company derived no support from the unconstitutional statute, and it was void as it would have been had no such statute been passed. * * *

"It will be seen the statute provided that in the power of attorney appointing an agent for the company within the state, there should be an agreement that the company would not remove a case to a Federal Court, and the statute was held to be void."

And further:

"In these two cases this court decided that any agreement made by a foreign insurance company not to remove a cause to the federal court was void, whether made pursuant to a statute of the state providing for such agreement, or in the absence of such statute; but that the state, having power to exclude altogether a foreign insurance company from doing business within the state, had power to enact a statute which, in addition to providing for the agreement mentioned, also provided that if the company did remove a case from the state to the federal court, its right to do business within the state should cease, and its permit should be revoked. It was held there was a distinction between the two propositions, and one might be held void and the other not."

The court then considers the case of *Barron v. Burnside*, involving the Iowa statute, and pointed out that that statute was held invalid for the reason that its central thought was the requirement of an agreement not to remove a suit into the Federal Court.

With reference to the case of *Southern Pacific Company v. Denton*, the court said that a statute requiring the corporation, as a condition precedent to obtaining a permi

to do business within the state, to surrender a right and privilege secured by the federal constitution and laws, was unconstitutional and void.

The real point in this *Security Mutual Life Ins. Co.* decision was stated by the court as follows:

> "As the state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

And further:

> "The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the state and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into federal court, your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection."

This decision by a majority of the court was dissented from by Justices Day and Harlan, Justice Day writing the dissenting opinion, and in the course of that opinion he said:

> "If a state may lawfully withhold the right of transacting business within its borders, or exclude foreign corporations from the state upon the condition that they shall surrender a constitutional right given in the priv-

ilege of the companies to appeal to the courts of the United States, there is nothing to prevent the state from applying the same doctrine to any other constitutional right which, though differing in character, has no higher or better protection in the constitution than the one under consideration. If the state may make the right to transact business as dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the state to exclude includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation, 'You may do business within this state, provided you will yield all right to be protected against deprivation of property without due process of law, or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws;' and so on through the category of rights secured by the constitution, and deemed essential to the protection of people and corporations living under our institutions."

In *Harrison v. St. Louis & San Francisco Railroad Co.*, 232 U. S. 318, the court had under consideration the foreign corporation law of Oklahoma. This statute, like the Kentucky statute, omitted the requirement for an agreement in advance not to resort to the federal courts, which had been held invalid in the cases arising under the Wisconsin and Iowa laws. The action was brought in the federal court and the state officers enjoined from enforcing a forfeiture of the company's right to continue in business after removing an action into the Federal Court. In the course of its decision upholding the lower court, this court, by Chief Justice White, said:

"It may not be doubted that the judicial power of the United States as created by the constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state actior,

which therefore the several states may not by any exertion of authority of any form, directly or indirectly, destroy, abridge, limit or render inefficacious."

In *Donald v. Phil. & R. Coal & Iron Co.*, 241 U. S. 328, the court upheld the action of the lower court in enjoining state authorities from revoking the license of a foreign corporation to do business in Wisconsin under a statute which provided that whenever any foreign corporation doing business in that state should remove an action into the Federal Court its license should be revoked. The court said:

"Consideration of the Wisconsin statute convinces us that they seek to prevent appellees and other foreign commercial corporations doing local business from exercising their constitutional right to remove suits into federal courts. To accomplish this is beyond the state's power.

"We are asked, in effect, to re-consider the question discussed and definitely determined in Harrison v. St. Louis, etc., 232 U. S. 318. We there said the judicial power of the United States as created by the constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which, therefore, the several states may not by any exertion of authority, in any form, directly or indirectly, destroy, abridge, limit or render inefficacious."

This analysis of the cases in this court, beginning with the *Morse* case, decided in 1874, and ending with the *Philadelphia & Reading* case, in 1916, shows that from the beginning this court held that any agreement required or made as a condition to obtaining a license to trasact business, by which a corporation agreed not to exercise its right, given under the federal constitution and laws, to resort to the federal courts either by independent action or removal, was void.

The *Doyle* case, with reference to the Wisconsin statute, held that while such an agreement would be void and could not be enforced, a state might by positive law provide that the right of a foreign corporation to continue business in the state could be revoked for any reason, good or bad, including resort by the corporation to the federal courts. This position was upheld as late as the *Prewitt* case, supra, but was finally abandoned in *Terral v. Burke Construction Company*, 257 U. S. 529, where the court definitely overruled the *Doyle* and *Prewitt* cases and said, in a unanimous decision written by the present Chief Justice:

> "The principle established by the more recent decisions of this court is that a state may not in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the federal constitution confers upon citizens of one state the right to resort to federal courts in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured, is void because of the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of Doyle v. Continental Ins. Co., 94 U. S. 535, and Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, must be considered as overruled, and that the views of the minority judges in those cases have become the law of this court."

In *Nashua River Paper Co. v. Hammermill Paper Co.*, 223

Mass. 8, the court considered the validity of the following clause in a contract:

> "No action at law, equity or chancery shall be instituted or maintained by the corporation in any court of any state of the United States or in any circuit or district court of the United States against the company other than in the courts of the Common Pleas of the State of Pennsylvania."

This was an ordinary contract between a Massachusetts corporation and a Pennsylvania corporation. The court held the stipulation invalid as against public policy. The case contains a review of the authorities, including the *Morse* case, in this court. After a full discussion of the cases and speaking particularly of the *Nute* case, which was relied on in the *Morse* case, the court said:

> "That case, as has been pointed out, states a general principle which has been adopted and prevails in all federal courts by reason of the binding decisions of the United States Supreme Court (citing the *Morse* and *Doyle* cases). The same rule prevails generally in all states where the question has arisen. It relates to a matter as to which uniformity of decision and harmony of law among the several jurisdictions of this country is desirable. It would be unfortunate if contracts touching a subject of general commercial interest, and which may be broadly operative as to jurisdiction, should be held valid in one state and invalid in all others. All these circumstances bring us to the conclusion that the clause in the contract here in question is unenforceable, and that therefore the action can be maintained in the courts of this commonwealth.

In *Prince Steam-Shipping Co. v. Lehman*, 39 Fed. 704, the court held invalid provision in a charter-party as follows:

> "It is further agreed that all disputes, if any, whether arising before or after shipment of cargo, and whether arising on this charter-party or on bills of lading signed thereunder, shall be settled at port of discharge only."

saying that such agreements have been repeatedly held to be against public policy and void.

In *Slocum v. Western Insurance Co.*, 42 Fed. 235, in holding invalid a clause in an insurance policy requiring any action thereon to be brought in a certain court in the city of Toronto, it was said:

> "The authorities, I think, sustain the general doctrine that a stipulation inserted in a contract limiting the remedy for a breach of the contract to a particular forum is not a valid stipulation. Citing a number of cases, including the *Nute* case.

In The Etono, 64 Fed. 880, a bill of lading under which goods were shipped provided that all damage claims should be "settled direct with the owners according to English law to the exclusion of proceedings in the courts of any other country." This was held invalid.

In *Mutual Reserve Fund v. Cleveland, etc.*, 82 Fed. 508, the Circuit Court of Appeals for the 6th circuit, which then included Justices Taft and Lurton, held invalid a stipulation in a policy of insurance that no suit in law or equity should be brought upon it except in a circuit court of the United States.

The Company in the case at bar consented to waive its contract rights under its old franchise and accept the indeterminate permit with full power or regulation, modification and repeal by the legislature. We think we have demonstrated that this action of the Company was never intended by either

the Company or the state to deprive the Company of its right under the federal constitution and laws to go into the Federal Court, and that even if both parties had so intended any contract attempting to carry any such intention into effect would be utterly void.

Cases Relied On By Appellants

Attorneys for the commission and the city cite a number of cases under their claim of the existence of a contract not to resort to the federal courts. We think none of these cases, nor any that can be found, give any support to such proposition. Short reference will be made to some of the cases relied on.

In *Public Service Commission v. St. Cloud*, 265 U. S. 352. it was determined that a contract fixing maximum rate for gas existed between the city and the company in a franchise which provided that:

> "In consideration of the rights and privileges herein granted the grantee hereby covenants and agrees that it will * * * erect * * * an efficient coal gas generating plant or system, of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least 14 candle power,"
>
> and
>
> "The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed * * * at a price of not to exceed"

a certain maximum therein stated. The court said:

> "We think that the language of the ordinance viewed in its entirety clearly shows that it was the intention of

> the parties to enter into a contract for the construction of gas works and the manufacture and supply of gas to the city and its inhabitants during the thirty year period at the maximum rate prescribed."

There is, of course, no similar language in Chapter 278, under which we are operating.

In *Georgia Railway & Power Co. v. Town of Decatur*, 262 U. S. 432, the principal question was whether or not the contract was within the power of the town. The Supreme Court of Georgia, in the case of the company against the Commission 149 Ga. 1, said:

> "The physical existence of a contract in 1907 between the Town of Decatur and the lessor of applicant prescribing a five cent maximum fare between Decatur and Atlanta is admitted."

In *Hall v. Geiger*, 242 U. S. 539, the court construed the constitutionality of the Ohio "blue sky" law. No question of the existence of a statutory contract was involved. The case has no application and is cited only for a statement that "the fact that the statute designates a particular court to review the executive findings does not affect the validity" of the statute. If we were attacking the validity of Chapter 278 because of the authority given in Section 10 to the state courts, this quotation might seem to have some bearing, but we are not making any such attack.

The city cites a number of cases from this court holding that where federal questions are brought to this court on writ of error from the decision of the highest state court, the federal question must have been presented to and passed upon by the state court and that the rules of practice of the state under which the federal question is passed upon will

be upheld if they give a fair oportunity to raise the question. *John v. Paullin, etc.*, 231 U. S. 583, is an illustration of this class of cases. This action arose in the state court and the controversy involved in part the interpretation of certain laws of the United States. The defeated party attempted to have the judgment reviewed by the state Supreme Court. That court held that its appellate jurisdiction had not been properly invoked and did not pass upon the federal question involved. This court declined to review the action of the state Supreme Court and said:

> "Certainly no federal right was denied by that court and if, as was held by it, its appellate jurisdiction was not properly invoked, no federal question was before it for decision.
>
> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction and the rules of practice to be applied in its exercise and the state law in practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

In *Columbus Railway Power & Light Co. v. Columbus* 249 U. S. 399, the court considered the rights of the company operating under a franchise fixing the rate of fare for a period of 25 years. The question had already been settled as to the character of the franchise and quoting from an earlier decision the court said:

> "In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the

> corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged."

The consent of the Company in the case at bar to be governed by the provisions of the act and that its existing grant might become an indeterminate permit, subject to revocation at any time, we submit lacks every element of contractual nature existing in the Columbus franchise.

In *Opelika v. Opelika Sewer Co.*, 265 U. S. 215, the sewer company was operating under an ordinance which purported to grant a right for 30 years and to authorize the company to charge rates not exceeding a fixed maximum. The ordinance provided that upon its acceptance it "shall thereupon become and be a contract between" the company and the city. The company filed such acceptance. The court said there can be no question that the instrument purported to be a contract and that it was a valid one binding the sewer company not to charge more than the prescribed rates.

It is submitted that none of these cases relied upon by the commission and the city is any authority for the proposition that the Company's consent to be governed by this act and have its grant for a definite period changed into an indeterminate permit, subject to revocation at any time, constituted a contract of any nature, and neither these cases nor any ohers that can be found are authority for the proposition that a contract, such as the commission and the city rely upon, prohibiting the company from resorting to the federal courts, would be valid if made.

III.

The Action Was Not Premature.

It is contended in the briefs of both the commission and the city that this action was brought prematurely in the district court for the reason (a) that comity and convenience required that the company exhaust its remedy under the state statutes and in the brief of the City for the reason (b) that no test was made of the rates prescribed by the commission's order.

The point as to the necessity for a test period was urged before the court of three judges on the application for interlocutory injunction and was disposed of in the oral opinion of Judge Sanborn referred to hereinafter.

A motion was made by the defendants and intervenor to dismiss the action and for judgment on the pleadings. This was heard at St. Paul on August 6th, 1923, and in denying those motions and holding that the company was not obliged to proceed further under the state statutes, the court said:

> "As it presents itself to my mind the matter before the court at this time is confined within rather narrow limits. The railway company, pursuant to Chapter 278 of the Laws of 1921 of Minnesota, has been before the Railroad and Warehouse Commission and the commission has made its findings and conclusions. At that point legislative action came to an end and the railway company, if it so desired, had the opportunity, as provided by the act itself, of appeal to the state district court. It did not avail itself of that opportunity but started an independent suit in the federal court, claiming that by the action of the commission it would be deprived of its property without due process of law because the rates fixed were confiscatory."

(a)

No Principle of Comity or Convenience Prevented the Company from Bringing this Action in the Federal Court as soon as the Commission's Rate Order was Made.

(1) *The Legislative Stage was ended; the Judicial Stage had been Reached and this Action was not premature.*

The order of the commission fixing rates was the final legislative act and the judicial stage was then reached. Further proceedings in the state court on appeal from the Commission's order, as authorized by the statute, are judicial in their nature and not legislative. This being so, the company at that stage had the option of appealing to the state court or bringing an action in the Federal Court. This question has been settled by the decision of the Minnesota Supreme Court, handed down since this appeal was taken in the case of *City of Duluth v. Railroad & Warehouse Commission of the State of Minnesota*, 209 N. W. 10. This action was brought by the City of Duluth against the Commission to enjoin further proceedings by the Commission under Chapter 278 on the ground that Section 10 of the act delegated legislative power to the courts and was therefore unconstitutional. The Supreme Court answered that claim of the City:

> "We see nothing in Section 10 imposing legislative or administrative duties upon the court." (Page 13)

Section 10 provides for an appeal from an order of the Commission to the state district court; for a trial of the issues and that the court

> "in any case involving rates * * * shall find and determine the fair value of such property and also what is a reasonable rate of return thereon, and shall affirm, modify or reverse any order or finding of such commis-

sion as may be required by law. The judgment or any order of such court shall be certified to said commission and the commission shall thereupon modify, reverse or put into effect its order or findings so as to conform to the judgment, order and findings of such court."

Article 3 of the state constitution provides:

"The powers of the government shall be divided into three distinct departments, a legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall execute any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution."

The Supreme Court, in holding Chapter 278 constitutional, said:

"The appeal as well as the action is based solely on the proposition that Section 10, Chap 278, Laws of 1921 * * * is unconstitutional and being the keystone of the act the whole thereof must fall upon its removal; * * *

"Fixing the rate at which a public utility must render service is concededly a legislative or administrative function (Steenerson v. G. N. Ry., 69 Minn. 353) and the contention is that Section 10, above quoted, invests the court, the judiciary branch of the government, with legislative powers, thereby contravening Article 3 of the state constitution." (page 11)

The court then discusses the provisions of Section 10 of the act, points out the duties of the court and of the commission thereunder, refers to the statute in force when the *Steenerson* case was decided and then says:

"We have no doubt that the provisions for an appeal to the court in the act involved in the Steenerson case was in deference to the opinion of the Federal Supreme Court in Chicago, Milwaukee & St. Paul Ry Co. v. Minnesota, 134 U. S. 418, and that Section 10 of the act here assailed was influenced by such decisions of that court as Bacon v. Rutland Ry. Co., 232 U. S. 134, Detroit & Mackinac Ry. Co. v. Mich. Com., 235 U. S. 402, and Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287—in the first two of which enactments, granting substantially the same powers and duties to the court on appeal from the rate fixed by a commission as in Section 10, were held not to confer legislative functions upon the court, and in the last of which the intimation is plain that such a judicial review as is afforded by said Section 10, both as to the law and the facts, is essential to a valid rate fixing * * *

"The inference is plain that, unless the state law provides complete judicial review or investigation by appeal, or otherwise, of a legislative or administrative rate fixed for future services to be rendered by a public utility, the rate fixed is of little validity or effect. To give standing and authority to the rate, to be fixed under the act in question, the lawmakers took pains to provide not only that the commission should hear, investigate, and determine the value and bearing of all the factors which go to make a fair rate of the future, but that, on appeal, the court shall independently on its own judgment and upon such evidence as may be adduced before it, determine at least two of the main factors which enter into rate making—the value of the property of the street railway and what is a fair return thereon * *

"Courts are strictly within their own territory when determining controversies between parties concerning past or present facts. In rate fixing for the future the parties concerned may differ as to existing facts, among others, the two most important ones referred to, and it would seem entirely proper that there be a judicial determination of the same * * *

"As already stated, Section 10 does not in words require the court to fix the rate but to affirm, modify or reverse any order or finding of such commission as

may be required by law. If the rate be found confiscatory, the court can neither fix a new rate nor modify the one under review. Its findings as to existing facts which were litigated on the appeal are binding on the commission, and the matter goes back to the commission, to put into effect orders or findings which conform to the action of the court. *We see nothing in Section 10 imposing legislative or administrative duties upon the court,* or any substantial departure therein from the act involved in the Steenerson case, supra, or State v. Great Northern Ry. Co., 130 Minn. 57." (page 13)

(Italics ours)

This question was raised with reference to a similar provision in the Telephone law by the Attorney General in *Northwestern Bell Telephone Co. v. Hilton,* 274 Fed. 384. It was contended there by the Attorney General (Page 389) that the legislative function of establishing reasonable rates for the plaintiff company would not have been completed until after the order of such district court on appeal, if such appeal had been taken, and that a suit brought in a Federal Court before such order is premature and the court without jurisdiction in the premises. The court said:

"But the claim is made by the defendant that the plaintiffs had the right to appeal from the order of February 9, 1921 to the state district court and until that was done and the state district court had acted, the legislative stage of the inquiry as to rates had not passed and the judicial stage had not been reached and that therefore the present suit is premature. * * * The state district court, under the laws of Minnesota as construed by the Supreme Court of the state, could not put itself in the place of the Railroad and Warehouse Commission and re-try the issues and establish new rates. It had no legislative power but judicial power only. Therefore in my judgment, when the order of February 9, 1921 was made by the Railroad & Warehouse Commission the legislative stage had come to an end and the judicial

stage had been reached. That being so, there can be no question but what at that stage the company might resort to the state district court or to the federal district court, as it saw fit. It chose the latter forum."

The same point was made again in the trial of the case now here on appeal, and the court in its opinion, found in 4 Fed. 2d, at page 545, said:

"At the outset the contention is again made by defendants that the suit is premature. This question was passed upon at an earlier stage in this case and it is not necessary to discuss it here at length. The conclusions heretofore reached are adhered to, viz.; that when the Railroad & Warehouse Commission made and filed its findings and order of July 13, 1922, fixing the rate of fare for plaintiff company the legislative stage was ended at that point and the judicial stage was reached; that the hearing before the state district court on appeal which is provided for in Section 10 of the act (Chapter 278 Laws of 1921 of the State of Minnesota) is judicial and not a continuation of the legislative rate-making process, otherwise the section is void; and finally, that under such circumstances the street railway company had the right to bring the present suit in the federal court." Citing Bacon v. Railway Co., 232 U. S. 134; Prendergast v. Tel Co., 262 U. S. 43; N. W. Bell Tel. Co. v. Hilton, 274 Fed. 384; Steenerson v. G. N. Ry. Co., 69 Minn. 353; State v. G. N. Ry. Co., 130 Minn. 57, and other cases.

These two decisions of the federal district court of Minnesota were handed down before the decision of the state Supreme Court upholding the constitutionality of the law and the *Steenerson* and *Great Northern Railway* cases, referred to by the federal district court, were both relied upon and followed by the state Supreme Court in upholding the constitutionality of the law.

In *Bacon v. Rutland Ry. Co.*, 232 U. S. 134, the court had under consideration an action to enjoin the Public Service Commission of Vermont from enforcing an order. The contention was made by the commission that the action was premature because the company had not taken an appeal to the Supreme Court as authorized by statute. The statute authorizing the appeal provided that upon appeal the court "may remand the case to said * * * (commission) with such mandates as law or equity require; and said (commission) shall enter judgment, order or decree in accordance with such mandates." This provision of the Vermont statute is identical in substance with the provision in the Minnesota statute, which is:

> "The judgment or any order of such court shall be certified to said commission and the commission shall thereupon modify, reverse or put into effect its order or findings so as to conform to the judgment, order and findings of such court."

This court, in its opinion, referring to the Vermont statute, said:

> "It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court. They only provide an alternative and more expeditious way of doing what might be done by a bill in equity. Whether the alternative is exclusive or concurrent, whether it opens matters that would not be open upon a bill or not, if exceptions are taken (which does not appear in this case) is immaterial; the remedy in any event is purely judicial: to exonerate the appellant from an order that exceeds the law."

This case is cited and relied upon by the Supreme Court of Minnesota in its decision upholding the constitutionality of

the law now under consideration and is a direct authority for the proposition which we now make,—that with the making of the commission's order the judicial stage was reached, the company had the option, if dissatisfied, of appealing to the state court or bringing the action in the Federal Court, and that this action was not premature.

In *Prendergast v. Telephone Co.*, 262 U. S. 43, this court held that upon the making by the commission of the rate orders in question the proceedings had reached the judicial stage, entitling the company to resort to the Federal Court for relief, and said:

> "Here the commission is vested with the final legislative authority of the state in the rate-making process, the authority exercised by the state courts on a review by certiorari being purely judicial but having no legislative character."

In *Detroit & Mackinac Ry. v. Michigan Railroad Commission*, 235 U. S. 402, the court had under consideration the Michigan statute providing for a Railroad Commission. This statute gave the commission authority to fix rates and provided that any carrier or person dissatisfied with the rates may sue the commission in a state circuit court to set aside the rates as unlawful or unreasonable and that the evidence taken in such action shall be transmitted to the commission for its consideration, and if the original order be not rescinded or changed judgment shall be rendered thereon.

It will be noted that under this statute the proceeding before the commission was in effect suspended, the action was taken before the court and the additional evidence submitted to the court was transmitted to the commission. The commission then had opportunity to rescind or modify its order, and judgment was not to be entered in the court until

the commission had taken this additional action. Claim was made that the action of the court was in its nature ligislative. It was held by a three-judge court, as reported in 203 Fed. 864 that this action of the court was in its nature judicial and this holding was affirmed on appeal to this court where this language was used:

"The important provisions (of the Michigan statute) are that any common carrier or other party in interest, dissatisfied with the orders of the commission, may bring suit in the state circuit court in chancery to set aside the order on the ground that the rates fixed are unreasonable and the court is given power to affirm, vacate or set aside the order * * * in whole or in part and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law. If different or additional evidence is introduced the court, before judgment, is to transmit a copy of it to the commission and the commission may alter or rescind its order and is to report its action to the court and the judgment is to be rendered, as though the last action of the commission had been taken at first. (citing the act) Taking the two provisions together, it seems plain the words 'such other order or decree' in the first do not embrace a change in the rates fixed, but only such other orders or decrees as are incident to an equity cause. If the order of the commission is to be modified by fixing a new rate, that is to be done upon the new evidence by the commission. This interpretation not only is the natural one upon the face of the statute, but avoids the difficulty that otherwise would arise under the constitution of the state. * * *

"The distinction between the judicial function of declaring a rate unreasonable and the legislative one of establishing a rate as reasonable is developed in (citing a number of cases). And in Bacon v. Rutland, 232 U. S. 134, it was held that statutory provisions very much like those of Michigan, under a constitution that in like manner separated legislative, executive and judicial powers, gave only the last to the courts."

In *Chicago Railway Co. v. Illinois Commerce Com.*, 277 Fed. 970, at 974, the court upheld its jurisdiction against the claim that the action was premature. The court said:

> "The order of the Illinois Commerce Commission was a complete exercise of the legislative power of the state, and was in force immediately after its passage, notwithstanding a motion to reconsider might have been urged and entertained. If the State of Illinois, vesting the power to regulate rates in the Commerce Commission, had provided that the orders of the commission should not be put into effect until after a certain time, within which an application for a rehearing could be made, another question would be involved; but the statutes of Illinois did not so provide, and the granting or denying of a petition for re-hearing being wholly within the discretion of the commission, the legislative act was complete upon the entry of the order.
>
> * * *
>
> "It is quite apparent from a reading of Prentis v. Atlantic Coast Line, above referred to and relied upon by defendants, that there the court of first instance was the final legislative body, just as in this case the Illinois Commerce Commission was the final legislative body. The Prentis case was carefully considered by Judge Hook in A. T. & Santa Fe Railway Co. v. Love et al, 174 Fed. 59, and by Judge Sanborn in the same case on appeal, 185 Fed. 321, and the logic of the opinions in those cases makes it quite impossible for a different conclusion to be reached here."

In *Abilene & S. Ry. Co. v. United States*, 288 Fed. 102. the three judges granted a temporary injunction to restrain the enforcement of an order of the Interstate Commerce Commission against the objection that the action was prematurely brought inasmuch as the act gave the plaintiff the right to apply to the commission for a re-hearing and that remedy should be exhausted before the suit was instituted. The court said:

"The application for a re-hearing does not operate to stay the execution of the commission's order. The act provides that it be not stayed on such an application unless the commission by special order grants a stay. Nothing could have been done by plaintiff pending application for rehearing that would have stayed the execution of the order as a matter of right. We think plaintiffs were entitled to take the order as final for the purpose of this proceeding. See Chicago Ry. Co. v. Illinois Commerce Com., 277 Fed. 970."

This decision was affirmed in *United States v. Abilene & S. Ry. Co.*, 265 U. S. 274.

In *Monroe Gas, Light & Fuel Co. v. Mich. P. U. Com.*, 292 Fed. 139, decided June 9th, 1923, the commission had made its order, no other proceeding had been taken. The court said:

"If a preliminary injunction otherwise should issue, we cannot rightfully deny it just because the commission announces that, if this rate shall finally be found non-compensatory, it will permit the loss to be amortized through a later rate. This policy is thoroughly fair, and is to be commended; but this commission is under no legal duty to take that course, and its intentions or its personnel may change. When the court sees a case of week by week and month by month continuance of confiscation, even if each monthly loss is small, the plaintiff is entitled to his injunction without waiting for possible future relief, unless for reasons not here present. See Prendergast v. New York Tel. Co. and Oklahoma Co. v. Commission, supra.

"It is suggested, perhaps not strenuously, that the utility has not exhausted its remedy through appeal to the Michigan courts. Prentis v. Atlantic Coast Line Co., 211 U. S. 210. It was held in Detroit, etc. v. Mich. Ry. Com., 203 Fed. 864, that the statutory power of the Michigan courts in an analogous case was judicial, not legislative.

> This was affirmed by the Supreme Court of the United States, 240 U. S. 564. We are not aware that it has been questioned by the Supreme Court of Michigan. It follows that the statutory appeal, and an application to a federal court under the fourteenth amendment are alternative, elective remedies. Bacon v. Rutland Co., 232 U. S. 134, The Prendergast case, supra."

Under its claim that comity and convenience require that the company should have taken its appeal into the state court rather than bringing this action into the Federal Court, the city cites three tax cases which merely illustrate the well settled rule that payment of the tax will not be enjoined as invalid where the taxpayer has not exhausted his remedies before the administration board nor where the taxpayer has an adequate remedy at law in resisting the payment of the tax.

In *Gorham Mfg. Co. v. State Tax Commission*, 266 U. S. 265, an injunction against the collection of the tax was denied where the taxpayer had not exhausted his remedy before the administrative board.

In *Keokuk & Hamilton Bridge Co. v. Salm*, 258 U. S. 122, in upholding the action of the lower court in refusing an injunction against the collection of the tax, this court points out that the taxpayer had not exhausted his remedy before the administrative body and had an adequate remedy at law in resisting the payment of the tax, and in *Farncomb v. Denver*, 252 U. S. 7, the other case cited by the city, the question was as to the validity of a local assessment. The taxpayer had failed to object to the assessment, as required by the city charter. This court held the charter provision valid and that the taxpayer, by failing to make his objection at the proper time, was precluded from making any further objection to the validity of the assessment.

There is nothing in these tax cases to support the city's position here.

The Minnesota Supreme Court, in upholding the law in question, relied also upon the cases of *Steenerson v. G. N. Ry. Co.*, 69 Minn. 353, and *State v. G. N. Ry. Co.*, 130 Minn. 57, in both of which it was held that under similar statutes the power delegated to the court was strictly judicial.

We think that the case from Minnesota upholding the constitutionality of this law in question, together with the decisions of this court construing the laws of Vermont and Michigan, furnish all of the authority required for our proposition that the legislative act of rate-making was completed and the judicial stage had been reached when this action was brought, and that therefore the action was not premature.

(2) *This action was not premature even if the duties of the court on appeal under the provisions of Section 10 be considered as legislative and not judicial.*

Following the decision of the *Prentis* case, 211 U. S. 210, under what we think was a misapprehension of that decision, some of the lower federal courts, acting under what they conceived to be a rule of comity, declined to proceed with actions involving rates so long as anything further remained that could be done in the state courts under the provisions of the state law. The misapprehension that we think existed as to the effect that should be given to this decision was cleared up by the terse expression of the Justice of this court who wrote the *Prentis* decision when he said in *Oklahoma Natural Gas Company v. Russell*, 261 U. S. 290, that

> "rules of comity or convenience must give way to constitutional rights,"

in a decision which reversed the order of the lower court in denying temporary injunction against the enforcement of

rates fixed by the commission and held that, notwithstanding the pendency of the appeal to the Supreme Court of the state, as authorized by the constitution, the plaintiffs were entitled to a temporary injunction restraining the enforcement of the rate order where the supersedeas had been refused in the appeal proceeding. The injunction had been denied upon the application to three judges upon the authority of the *Prentis* case. With reference to that the Supreme Court said:

> "If the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they now are limited. They have done all that they can under the state law to get relief and cannot get it. If the supreme court of the state hereafter shall change the rate, even nunc pro tunc, the plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted. Springfield Gas & E. Co. v. Barker, 231 Fed. 331, 335. In such a state of facts, Prentis v. Atlantic Coast Line Company has no application. See Love v. Atchison, etc., 185 Fed. 321, 324, 325. Rules of comity or convenience must give way to constitutional rights. In the case cited there was no doubt as to the jurisdiction of the circuit court, but simply a decision that the bills should be retained to await the result of appeals if the companies saw fit to take them. The companies had made no effort to secure a revision and there had been no present invasion upon their rights, but only the taking of preliminary steps toward cutting them down. In such circumstances it was thought to be more reasonable and proper to await further action on the part of the state.
>
> "As in our opinion the district court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered, the cases should be remanded to that court, with directions to proceed to the trial."

In *Pacific Telephone & Tel. Co. v. Kuykendall*, 265 U. S. 196, the claim was made that the action of the Federal Court

was premature because the company had not exhausted its remedy in the courts of the state and after describing the conditions then existing this court said:

> "Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a Federal Court of equity from suspending the daily confiscation, if it finds the case to justify it."

In *Banton v. Belt Line Railway Corporation*, 268 U. S. 413, it was contended by the appellants that when the suit was commenced the rate-making process was not completed and that the appellee had not exhausted its legal remedies in the state tribunals and on this point the court said:

> "On the point under consideration it must be assumed that the joint fare of five cents was confiscatory, as alleged. The continued enforcement of that rate would operate to take appellee's property without just compensation, and to compel it to suffer daily confiscation. Notwithstanding the matter was pending on rehearing, the appellee had the right to sue in the Federal Court to enjoin the enforcement of the rate. It was not bound to await final action by the commission, and, if the rate was in fact confiscatory, to serve in the meantime without just compensation."

And finally, in *Smith v. Ill. Bell Tel. Co.*, 270 U. S. 587, 70 L. Ed. 440, the claim was made that the company had not exhausted its legislative remedies before bringing the action in the Federal Court. The rate application was still pending before the Commission although no action had been taken for a period of two years. In holding that the action might then be brought in the Federal Court to enjoin the enforcement of the rates then in force, this court said:

"Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them, and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a Federal Court for equitable relief."

Chapter 278, Laws of Minnesota for 1921, was approved April 14, 1921. The plaintiff filed its consent and came under the provisions of the law on April 28, 1921. At the time of coming under the provisions of the law the existing franchises of the plaintiff limited it to a five-cent fare, which it was then charging throughout the city. Section 8 of the Act provides:

"The rates which the street railway is authorized to charge and collect under existing franchises shall be and remain the authorized and lawful charge until a rate is fixed by the commission under the provisions of this act."

Section 10 of the act provides for an appeal by either party from the order, ruling or decision of the Commission to the district court and that such appeal shall be taken and proceeding thereunder had as prescribed by Sections 4191-4199, inclusive, of the General Statutes of Minnesota for 1913. Provision is also made in this section for an appeal to the state Supreme Court from the final judgment or order of the district court, which appeal to the Supreme Court is governed by Section 4200 of the General Statutes.

Section 4192, covering proceedings on appeal to the district court, provides:

"Such appeal shall not stay or supersede the order appealed from unless the court, upon an examination of said order, and the return made on said appeal, and after

giving the respondent notice and opportunity to be heard, shall so direct."

Section 4200, covering appeals to the Supreme Court, provides:

"No such appeal shall stay the operation of such order or judgment unless the district or supreme court shall so direct."

The situation of this Company, then, was this: Unless and until a rate was fixed by the Commission under the provisions of Chapter 278, the act itself fixed a rate of fare at five cents. The Commission, by its order, fixed the rate at six cents cash, five tickets for twenty-five cents. The only power that the court would have under the law would be to supersede the rate fixed by the Commission and leave in effect the rate fixed by the legislature in the act itself, of five cents. The law provides no method of any sort by which the court could give any relief from the confiscatory order of the Commission except by superseding it and putting into force a lower and more confiscatory rate.

In view of the decisions of this court which have been referred to, beginning with the *Oklahoma* case in 261 U. S., this court has consistently held to the proposition, so tersely stated in that decision, that rules of comity or convenience must give way to constitutional right and that principle requires a determination in this case that the action in the Federal Court was not premature, whether the proceedings on appeal to the state court, as authorized by the statute, be considered as judicial or as legislative in their nature. We think, however, that they must be considered as judicial under the decisions of the State Supreme Court of Minnesota and of this court.

(b)

The Action was not Premature Because Brought Before Testing the Commission Rate.

The City has raised this point at each stage of this proceeding and each time has been overruled.

The Company was operating under a straight five-cent fare when the law was passed and its experience under that rate was a practical test of the rate fixed by the commission, six cents cash, five tickets for twenty-five cents; a five-cent rate for every one who cared to invest at any one time as much as twenty-five cents.

The Company established by its affidavits before the statutory court of three Judges and by its evidence before the Master that under such a rate more than 90 per cent of the passengers could be expected to ride at the five-cent rate of fare.

In the argument on the issuance of the interlocutory injunction before the three Judges the same cases from this court were used as are now relied upon by the city and cited on pages 40 and 41 of the city's brief, and in response to this argument Judge Sanborn, in delivering the opinion of the three Judges, said:

> "It was suggested here that the rule should be that there should be no relief granted to corporations or individual whose property was being taken unless it was proved beyond doubt. We do not agree with that proposition. We are of the opinion that when it appears with reasonable certainty that for some time in the past and during the present a man or a corporation is being deprived of his property without any compensation,—being confiscated,—whether the amount of the confiscation be all of his property or any substantial part of it, he ought to be relieved of it if it is within the power of the Federal

Court to do it. We are satisfied that this corporation has been deprived during the last six months of a part of its property and that the rate which has been prescribed by the commission of six cents cash and five tickets for twenty-five cents will continue the deprivation until there is a radical change in the business of the company."

The order of the Master was dated December 10, 1923, and the evidence included the operations of the Company under the six cent fare until July 31, 1923 (R 718). The Master found (R 704) that:

"Under the rates and charges established by the Railroad and Warehouse Commission of Minnesota in and by its order of July 13, 1922, the plaintiff could not and will not earn sufficient to meet its operating expenses and taxes and receive a net return of 7½ per cent on the *fair* value of its property as it was on December 31, 1921, and that the enforcement of said order would therefore deprive plaintiff of its property without just compensation; that to earn such return the plaintiff must be permitted to charge and collect six cents for each passenger carried by it in the city of Duluth."

In the final decree, from which this appeal is taken, (R. 733) it is determined:

"That the order of the Railroad and Warehouse Commission of the State of Minnesota dated July 13, 1922, establishing rates and fares to be charged and collected by the plaintiff for the transportation of passengers on its street cars in the city of Duluth from and after the first day of August, 1922, would, if enforced, deprive the plaintiff of its property without due process of law and deny to the plaintiff the equal protection of the law and take from the plaintiff its property without compensation, and said order was and is contrary to the provisions of the constitution of the United States.

This record, we think, demonstrates that the decree
joining the enforcement of the Commission's order was rig
and should be affirmed. The Company's experience for
year under a six-cent fare and its former experience under
five-cent fare furnished all the test necessary. There was
necessity for any test period of the Commission's rate. T
test, wherever required, has only been to furnish the nec
sary evidence as to the effect of the proposed rate. There
no necessity for such test if without evidence, satisfactory
the court, can be produced establishing the invalidity of t
rate. This is conclusively established by the cases from th
court cited by the city.

In the *Knoxville* case, the court said (italics ours):

> "If a company of this kind chooses to decline to
> serve an ordinance of this nature and prefers rather
> go into court with the claim that the ordinance is unco
> stitutional it must be prepared to show to the *satisfacti*
> *of the court* that the ordinance would necessarily be
> confiscatory in its effect as to violate the constitution
> the United States,"

and after quoting from other cases the court continued:

> "*It cannot be doubted that* in a clear case of confis
> tion it is the right and duty of the court to annul the law

In the *Knoxville* case, the trial court declined to recei
evidence as to operations after the ordinance was adopted a
the action started. This was held error and the court said:

> "But evidence of the operations of the years succe
> ing to the ordinance is relevant and of great importan

and by a consideration of such evidence a much greater degree of certainty could be obtained."

In this case the trial court had the benefit of that evidence in the result of one full year of operations after the effective date of the Commission's order.

In the *Wilcox* case, cited by the city, which involved the gas rates of New York, the court, while holding that the evidence did not warrant injunction, said:

"Of course there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature, and in that event there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate."

In *City of Louisville v. Louisville Home Telephone Co.*, 279 Fed. 949, the court, among other things, said:

"It is said that, before an injunction issues suspending a legislatively fixed rate, there should be a trial period. This has often been thought a proper preliminary step (citing cases) though we think the conclusion has always been a discretionary one upon the facts of the particular case, and that there has never been any hard and fast rule to that effect. In any event, the present situation is not closely analogous to those in which the trial period has been required. In the railroad cases, as well as in the gas and water cases, the challenged law had reduced the existing rate. This would inevitably tend to increase the number of customers and to diminish the applicable overhead. There was plausible insistence that the net result would be, or might be, a gain and not a loss. In the present case, and in a very fair sense, there had

> been a trial period. For the year 1920, the last year of the franchise rates, the gross receipts and the operating expense and the net income were known. The company claimed that it received no substantial return upon its investment. The city did not deny that the company was entitled to an increase in rates. The temporary ordinance, which was rejected by the company as insufficient, and which is now under attack, increased the rates between 20 per cent and 25 per cent above the old ordinance. It is not to be doubted that the tendency of this increase, considered alone, would be to lessen the number of customers, and thereby diminish the gross receipts and increase the distributed overhead. The main reason for requiring a trial period thus seems to be absent."

In the *Prendergast* case, 262 U. S. 43, there was no test of the rates which were enjoined.

In the *Knoxville* case, the court said that the requirement in the absence of a test was to show to the *"satisfaction"* of the court that the ordinance would necessarily be confiscatory and in this case Judge Sanborn, speaking for the court of three judges granting the interlocutory injunction, said:

> "We are satisfied" that confiscation has been going on and under the Commission's order would continue.

The Master, with an experience under the somewhat higher rate for one full year, decided that the order was confiscatory and the trial court upon the same evidence approved the Master's report and made the same finding.

The Company had been operating for years under the straight five-cent fare. The order of the Commission, which continued the five-cent fare for everybody who was willing to pay for five rides at one time and only allowed one cent additional for the casual rider who would only pay for one ride

at a time, was such a slight advance that the experience of the Company for the years preceding was for all practical purposes a test of what would be received under the Commission rate, and under all the circumstances we submit no other test was necessary or required, and a test of the Commission's rate would, as Judge Sanborn said, have only resulted in still further depriving the company of its property.

IV.

Valuation.

The City complains of the valuation established by the decision of the trial court in only two respects (a) as to the items concerning cost of financing and (b) as to the amount added to the pre-war cost to reflect the then present day prices. Otherwise the City makes no claim but that the values placed upon the component parts of plaintiff's property were proper.

(a) *Cost of Financing was properly allowed.*

The Master found and reported that "the original financing cost was $89,075.00" and included that amount in the value. The trial court approved this.

The cost of financing is always present in the marketing of any security.

By cost of financing we mean that element of cost or expense which is incurred in securing moneys to finance the property.

In the case of *Ben Avon Borough v. Ohio Valley Water Co.*, 271 Pa. 346. The Supreme Court of Pennsylvania said:

"The last question is whether or not brokerage on

the sale of the bonds of the water company should have been allowed. The Commission says that sufficient evidence of actual payment thereof was not produced, but everybody knows that expenses are necessarily incurred in such sales; even our Victory and Liberty Bonds could not be marketed except at a very heavy cost. There is no legal principle standing in the way of making proper allowance therefor, and it is difficult to understand the basis of the mistake of those who hold it should not be allowed. The matter is in the same situation as if appellee had placed its bonds in the hands of an agent, with direction to sell them and apply the proceeds as needed, for construction expenses. These bonds were all that the water company had to apply in payment of the plant, and the use thereof for this purpose, in the final analysis, constituted simply an exchange of one for the other. If it had been remembered that money itself has no value except that given to it by reason of the fact that other commodities can be obtained in exchange for it, the error of refusing to allow this as a principle expense would probably not have been made."

In *Galveston Elec. Co. v. Galveston*, 258 U. S. 388, this court refused to allow an item of cost of financing to be included in the rate base, not by reason of the fact that cost of financing is not proper to be considered but by reason of the fact that there was no proof adduced that the company had incurred a cost or expense in connection therewith. The court said:

"The other item included by the Master in determining base value, but disallowed by the court, is $67,078 for brokerage fees. There is no evidence that any sum was in fact paid as brokerage."

In *City of Winona v. Wisconsin-Minnesota Light & Power Co.*, 276 Fed. 996, 1004, the court said:

"I have eliminated entirely the item of cost of financ-

ing. Not but what such an item is proper in cases where the evidence shows such expense was incurred, but I have been unable to find any such evidence in the present record."

The City, on page 62 of its brief, said:

"Apparently the Master in the present case distinguished the above cited authorities on the ground that it did not specifically appear in evidence in the cited cases *that the sums claimed were* in fact paid by the company; whereas in the present case it did appear that $89,075 had been paid as cost of financing through bond discounts or otherwise."

The Master found that the original cost of financing was $89,075, and in his report said:

"What has been said with reference to overheads applies equally to cost of financing. There is to be no refinancing of the property at this time, but it appeared from the evidence that the original financing cost was $89,075 and that amount has been included."

The trial court, in the decision appealed from here, said:

"The Master has included one item which does not appear separately in the Commission's table, viz.; cost of financing. In my opinion this is an item which should only be included, provided the evidence shows that it had an actual as distinguished from a theoretical existence. The Master so found, and I think his finding is supported by the evidence, and that the amount allowed by him, $89,075, should be approved." (See 4 Fed. 2nd, p. 549).

The City does not claim but what the Company did actually expend this sum of $89,075 in connection with the marketing of its securities. It was an actual expense incurred, carried on the Company's books as such. The City's complaint is that even though the expense was incurred, it should not be allowed. We do not understand this to be the rule but we understand the rule to be as recognized in the *Ben Avon* case, supra.

This decision of the Supreme Court of Pennsylvania was followed by the Pennsylvania Public Service Commission in the case of *Borough of Wyoming v. Luzerne County Gas and Electric Co.*, P. U. R. 1922 A, at page 59, the Commission stating:

> "The complainants and respondent both contend that bond discount should not be capitalized and that provision should be made for its amortization during the life of the bonds, the respondent claiming that the necessary amount be considered as an item of operating expense and the complainants that it should be considered as a deduction from income. The law has now been settled by the recent decision of the supreme court in Ben Avon Borough et al. v. Ohio Valley Water Co., 271 Pa. 346, decided July 1, 1921, wherein it was held that bond discount is to be considered by the Commission as an element entering into the determination of fair value."

The Utah Commission in *Utah Light & Traction Company*, 1920 B, 262, held that the cost of acquiring money, which covers the cost of selling or marketing securities for the permanent financing of utility property, is a reasonable charge entering into the cost of the property and should be allowed in valuation proceedings, except where the charge has been amortized or has been recouped from earnings. The Commission at page 279 said:

"This item covers the cost of selling or marketing securities for the permanent financing of the property. This is usually done through regular organizations engaged in the business of selling securities. This cost of marketing must not be confused with bond discount or discount on notes. The cost will vary with every property, according to conditions, the rate of interest which the security carries, the attractiveness of the enterprise itself, standing of the originators of the enterprise, the security of the earnings, etc. It is a reasonable charge entering into the cost of the property, and should be allowed in valuation proceedings, except in cases where this charge has been amortized, or has been recouped from earnings. Testimony before this Commission is to the effect that no amortization fund has been set up to take care of this expense. An allowance has, therefore, been made in the final summary."

The Utah Commission followed this rule in *Power & Light Company*, P. U. R. 1922A, 436, at 447, where it is said:

"Costs of selling or marketing securities for the permanent financing of the property, is usually done through regular organizations engaged in the business of selling securities. This cost of marketing must not be confused with bond discount or discount on notes. It is a reasonable charge entering into the cost of the property, and should be allowed in valuation proceedings, except in cases where this charge has been amortized or has been recouped from earnings."

(b) *Amount added to reflect present day prices was not too high.*

The latest decision bearing upon this question by a court of last resort, to which our attention has been called, is that of *Waukesha Gas & Electric Company v. Railroad Commission of Wisconsin*, decided in January, 1927. This decision re-

verses the judgment of the lower court and vacates the order of the Railroad Commission as confiscatory because the Commission did not, in determining the value, give sufficient weight to the present reproduction cost. The decision is based largely upon the *Indianapolis Water Company*, 47 Sup. Ct. Rep. 144. In the course of its decision the Supreme Court of Wisconsin says:

> "A valuation which does not as to the tangible property substantially reflect the then cost of reproduction less depreciation does not meet the requirements. The utility is entitled to the present fair value of its property as a basis for rate making. * * * Since the basic result to be reached is the present and near future fair value of the property any method that will accomplish that result is a proper method. It is doubtful if any method will accomplish such result unless it substantially reflects or agrees with present or recent reproduction cost less depreciation."

In the proceedings before the Commission and again before the Master the evidence showed that the representatives of the City and of the Company had agreed upon the inventory of the physical property of the Company and agreed upon the cost of reproduction of the physical property of the Company as it existed on July 1, 1921, except land, on four different bases, as follows:

1. Upon the cost of reproduction based upon 1915 prices.

2. Upon the cost of reproduction based upon the average of prices for ten years ending July 1, 1921.

3. Upon the cost of reproduction based on July 1, 1921 prices.

4. Upon the cost of reproduction based upon units used

in the actual construction of the property or an investment basis.

The results of applying the agreed inventory of the physical property of the Company as of July 1, 1921, except land, to the agreed unit prices on these different bases was as follows:

Basis No. 1, 1915 prices	$3,488,161.00
Basis No. 2, ten year average	4,864,437.00
Basis No. 3, July 1, 1921 prices	6,308,966.00
Basis No. 4, Investment basis	3,487,020.00

It will be noticed that the reproduction or investment basis applied to this inventory produced a result of $1,141 lower than that obtained by using 1915 prices. The result obtained by using the ten-year average was approximately 140% of the investment basis, and by using the July 1, 1921 prices was approximately 180% of the investment basis. (Rec. Page 20).

The City employed as its expert engineer on the question of valuation Mr. Byron T. Gifford, and the Company employed A. L. Drum & Company. The result of their investigations was submitted in comprehensive statements, both to the Commission and to the Master. They agreed on the inventory of the physical property and as to the unit costs for reproduction of the physical property, except the land, upon the four bases that have been mentioned. They did not agree upon the intangible elements considered in their reports in connection with value. Complainant's exhibit 32, which was introduced both before the Commission and before the Master, is a tabulation of the reports of the two engineers upon the four bases above described. The initials A. L. D. represent A. L. Drum & Company, the Company's expert engineer, and the initials B. T. G. represent Byron T. Gifford, the City's expert engi-

neer, and the reproduction cost as shown in this table is of the property undepreciated. For the convenience of the court, a copy of this exhibit is printed as an exhibit to this brief.

There was little difference of opinion between the engineers for the City and the Company as to the amount of the accrued depreciation. The Commission found upon the evidence submitted, including the reports of their own engineer, an accrued depreciation of 17% and this finding was approved by both the Master and the trial court.

The Commission found (Rec. P. 27) the value of physical property undepreciated, excluding land, as of July 1, 1921, $3,940,000.00. The agreed reproduction cost of the same property on the investment basis, which was $1,141 less than the 1915 basis, was $3,487,020. To give effect to the increased prices, the Commission added to the investment basis, which was less than the pre-war basis, $452,980.00, which was 12.99+%, and this was the only recognition which the Commission made of the increased prices, which according to the unit prices agreed upon by the City and the Company was for the ten-year average ending July 1, 1921 approximately 40%, and for the prices prevailing July 1, 1921, approximately 80%. The trial court, as pointed out in the City's brief, deducted that portion of the property of the Company that had been acquired during the period affected by higher prices, and added to the investment basis for the balance of the property 40%.

The Company contended before the Commission and before the Master and the trial court for a much higher valuation, and we still think that the valuation found by the court was too low, but we have taken no cross appeal, and the only question before the court now is whether the decree of the court below, enjoining the Commission's order as confiscatory, was right.

The decision of the trial court was made before some of the later decisions of this court, in which this court has more

clearly stated the effect that should be given to higher prices prevailing since the war. The trial court, in adding 40% to the reproduction cost of the property acquired before prices were affected by the war, determined on the investment or pre-war basis, in effect adopted as to such property the average prices for the ten years ending July 1, 1921, as shown in the Basis No. 2. This was the basis, as we understand, that was adopted by the Commission in the *Indianapolis Water Company* case, recently decided by this court. In that case the court said:

> "The price level adopted by the Commission for the average for ten years ending with 1921 was too low,"

and further said:

> "We may take judicial notice of the fact that there has been no substantial general decline in the prices of labor and material since that time (1923). The trend has been upward rather than downward."

The value established was as of December 31, 1921, at which time the price of commodities affecting the cost of street railway property was more than 50% above pre-war prices, and the undisputed testimony is to the effect that at the time of the hearing the increase in price of commodities affecting the cost of the property of complainant was 55.8% over pre-war prices; as of December, 1922, an increase over pre-war prices of 59½%; as of April, 1922, an increase over pre-war prices of 55.7%; and that the range of prices affecting component parts of the property from and after December 31, 1921, to and including the time of the hearing, was between 55.7% and 59½% above pre-war prices. (Rec. p. 251).

It was agreed by all parties and found by the Commission,

the Master and the trial court that the cost inventory of items of physical property, excluding the land, on the investment basis, was $3,487,020, and other items not inventoried amounting to $6,385.00, making a total of $3,493,405. (4 Fed. 2nd, p. 548). The trial court found that $2,830,189 represented the amount of the pre-war items, which was increased by 40% to reflect present day prices. As to the balance of the inventoried property, nothing was added.

The method by which the trial court arrived at valuation is set forth in full, with accompanying tables, in 4 Fed. 2nd, p. 543. We quote, however, only the following:

> "It is my opinion, therefore, based upon the evidence, and in view of the decisions of the courts, that sufficient consideration was not given to the increase in prices in the past few years.
>
> "In the Rand case (C. C. A.) 285 Fed. 818, the Master, under somewhat similar circumstances, used a 25 per cent increment over pre-war prices, to arrive at the then present prices. The Circuit Court of Appeals said this was insufficient and used a 50 per cent increment. The value in the Rand case was made as of January 1, 1920; in the present case, as of December 31, 1921. But the Circuit Court of Appeals, speaking as of January 8, 1923, used the following language:
>
> 'We are authorized to take notice that no marked *recession* of prices has taken place since the time this case was heard by the Master and that there is no present appearance of an assured reduction.'
>
> "Since that time there have been, in my judgment indications of a reduction in general prices to some extent; but I think in the instant case at least a 40 per cent increase should have been used on that part of the inventory basis figures which represented pre-war items. This, the evidence fairly shows, was $2,830,189. The modified figures would thus appear as follows:

Undepreciated value inventory items, less land, investment basis	$3,487,020.00
Add outside of inventory	6,385.00
Total	$3,493,405.00
Add 40% on $2,830,189	1,132,075.00
Total	$4,625,480.00
Depreciation 17%	786,331.00
Depreciated value	$3,839,149.00

The table of agreed upon bases of valuation above given is ample evidence to sustain this modification."

The City claims that the 40% increase should not have been added.

The City's claim in this regard is not based on any arguments that the addition is not justified by the evidence in this case. In truth, the evidence would support a valuation on the physical property, exclusive of land as of July 1, 1921 of 80% above pre-war prices.

The summary of all of the items entering into the valuation as found by the trial court is set forth in 4 Fed. 2nd, p. 549, as follows:

"Undepreciated cost of physical property items, excluding land	$3,493,405.00
Add 40% on $2,830,189.00	1,132,075.00
Depreciation 17%	786,331.00
Depreciated value	$3,839,149.00
Overheads	369,534.00
Land	128,474.00
Working capital, materials and supplies	135,000.00
Cost of financing	89,075.00
Going value	350,000.00
Power contract	91,300.00
Additions between July, 1921 and December 1921	6,978.00
Total	$5,009,510.00

As previously stated, the City complains concerning but two items—first, the cost of financing, and second, the amount added to reflect present day prices. As to the cost of financing, the expense was incurred. As to the 40% added to reflect present day prices, this was too low under the undisputed evidence and under the *Indianapolis Water Company* case. The value as established by the court was lower than that to which the Company was entitled.

V.

Operating Expenses.

The Commission found the operating expenses, based upon the year 1921, to be $1,111,726.84, which included state taxes but not federal income tax. The Master, basing his figures upon the year ending July 31, 1923, after making some minor changes, deducted $38,8[illegible]3.83 from the Company's estimate of Operating Expenses, added the estimated amount of the federal income tax, under the authority of *Georgia Railway & Power Co. v. R. R. Comm.*, 262 U. S. 625, and found the amount of Operating Expense to be $1,191,024.39. (Rec. p. 721)

The trial court approved the operating expenses as found by the Master (4 Fed. 2nd, 550).

The Commission does not discuss the matter of Operating Expenses in its brief. The City objects to certain items of Operating Expenses, as found by the Master, and approved by the court. These items and our answer to the City's objections follow:

A. *Depreciation.*

On pages 86 to 91 of the City's brief the question is

raised as to the propriety of the item allowed by the Commission, the Master and trial court for annual depreciation, the amount $115,000 being computed by the Commission on a basis of 2½% upon the undepreciated value of the depreciable property.

The City does not question the rate of 2½%, statement being made on page 91 of the City's brief, "no contest should be made over the percentage allowed for annual depreciation stated at 2½%."

The claim, however, is made by the City that depreciation was allowed upon undepreciable property. (See City's brief, page 87). In this the City is in error. The Commission based its depreciation upon the value which it found of the depreciable property undepreciated. This method was clearly right and was approved by both the Master and the trial court. The City's error consisted in overlooking this fact and assuming that the Commission was basing its percentage of depreciation upon the depreciated value of the property.

The Commission found the undepreciated value of the depreciable property to be $4,600,000, made up of the following items:

Physical property undepreciated, excluding land,	$3,940,000.00
General overheads	550,000.00
Power Contract	110,000.00

The Commission then depreciated this value by 17%, arriving at the value of the depreciable property depreciated $3,818,000, and then to find the rate base, the Commission added the value of the following items as found by the Commission:

Lands	$ 140,000.00
Working capital, material and supplies	135.000.00
Going concern value	500,000.00
Total	$4,593,000.00

(Record P. 27)

Therefore, according to the Commission's figures, the total depreciated value as of July 1, 1921, of all classes of property, both depreciable and undepreciable, was found to be $4,593,000, while the undepreciated value of the depreciable property was $4,600,000. The two figures are only $7,000 apart. This may have misled the City. After determining the value of the depreciable property, the Commission then determined "that the amount to be included in operating expenses for depreciation can be somewhat reduced and has adopted a figure of 2½% to be applied upon the *depreciable* property, which produces a figure of $115,000.00" (Record p. 28).

The Master thoroughly understood that the Commission, in computing the amount of depreciation, used only the undepreciated value of the depreciable property as a base and in his report said:

> "The Commission found 2½% upon depreciable property a reasonable allowance and computing this upon the physical property, excluding land, undepreciated, and including general overheads, power contract, a total of $4,600,000, allowed depreciation at $115,000." (Record p. 719).

The trial court found the undepreciated value of the physical property, excluding land, to be $4,625,480. (4 Fed. 2nd 548) The Master found the value of overheads to be $369,534, (Record p. 719), and the trial court approved this finding. (4 Fed. 2nd, 549)

The trial court said:

> "The item of annual depreciation of $115,000 cannot be considered excessive in view of the modified valuation above given." (4 Fed. 2nd 550).

B. *Increased Service.*

The City claims that the operating expenses of the Company were increased by the amount of $42,158.69 by reason of increased service furnished by the company upon the West Third Street Line, without approval of the City having first been obtained to such increased service.

During the twelve-month test period, there was some increase of service in the City of Duluth.

The number of car miles operated in the year 1921 was 3,283,232 and in the twelve-month test period was 3,546,439, being a difference of 263,207 of which 10,000 miles was, by reason of additional service on the Park Point line ordered by the City Council, leaving 253,207 additional car miles operated in other parts of the City (Rec. p. 668-669).

The additional car miles operated in other parts of the City increased the Company's operating expenses by approximately $42,158.69, being the variable expense which was computed by engineers for the City, the Commission and the Company on the basis of 16.65 cents per car mile (Rec. pp. 668-669).

Practically, if not all, of this increased service was upon what is known as the West Third Street Lines. Mr. Warren testified that prior to furnishing the extra service on November 27, 1922, there had been carried on the West Third Street Lines from 44½ to 39 passengers per one-way trip on the ten minute base schedule headway during the noon-rush hours, and there had been carried on the portion of the West Third Street Line affected by the increased extra service the following average number of passengers daily by quarters:

July, 1921	19,891
October, 1921	18,493
January, 1922	18,974
April, 1922	19,548
July, 1922	18,952

About this time, October and November, 1922, jitneys began to run upon West Third Street and for the October quarter, 1922, the daily number of passengers dropped to 16,380. Commencing November 27th extra trips were run during the non-rush hours and the daily average for the quarter ending January, 1923, had increased to 19,834, and

April, 1923	20,222
July, 1923	18,138

which shows clearly that the additional service secured additional passengers (Rec. p. 692).

At the time the decrease was noted in the number of passengers carried on the West Third Street Lines there was no corresponding decrease in other parts of the city and when the increase was noted after putting on the extra service there was no corresponding increase noted in other parts of the city. (Rec. p. 692).

The decrease as noted in October, 1922, was equivalent to 11.4% in that section of the city, while throughout the city as a whole the decrease was but 5.8% and for the quarter ending January, 1923, the increase on the West Third Street Line was 21.1%, while the increase in the city as a whole over the previous quarter amounted to 12.8% (Rec. pp. 693-694).

In July, 1921, 44.5 passengers were being carried for half trips on the West Third Street Lines affected by the subsequent increase in service, while the highest number in any other section of the city was 37.4 passengers per half trip (Rec. p. 613).

In October, 1921, the average on the West Third Street Lines per half trip was 41.1 passengers, while the highest in any other portion of the city was 33.6. After the increase in service the average passengers carried was 32½ per half trip, compared to other lines in the city carrying 35, 34, 33,

32, 27, 26, 23 and lower figures for some other lines (Rec. p. 613).

From the foregoing it would seem that compared with the rest of the city the West Third Street district, until the time the service was increased, was not being as fairly treated as the remaining portions of the city.

By way of added revenue, the Company received more than the cost of this increased service. In other words, from a managing standpoint, the increased service was justified (Rec. p. 696)). Whatever increase there was in the operating expenses by reason of the increased service, the same was more than made up by the increased revenue derived therefrom (Rec. p. 696).

The Master also took the view that the increased service was justified and that the service paid for itself, the Master's report stating:

> "During the last eight months of the year ending July 31, 1923 the plaintiff, without asking or receiving authority from the city, increased the number of cars upon one or more of its lines, increasing the car miles operated by approximately 252,207, and at an increased operating expense of approximately $42,158.69. No evidence was produced to indicate that this additional expense was not incurred in good faith, nor was there any definite showing as to what effect it had upon the revenues of the Company, although Mr. Warren, the General Manager of the Company, testified that he believed the service paid for itself.
>
> "The definite schedule approved by the City Council should be construed as the minimum service required and in the absence of a strong showing either that the additional service was wholly unnecessary and ill advised, or that it was not furnished in good faith, the expense of such service should not be deducted from operating expenses and the claim for such reduction is disallowed." (Rec. p. 719).

C. *Attorneys' Fees.*

The Company paid and charged into Operating Expenses attorneys' fees in amount of $15,000 in connection with the present case before the Commission and court. The Master allowed this item as an operating cost, amortizing it over a period of five years, and included in the operating expenses $3,000 for one year. The City maintains that this is not a proper charge, and that the operating expenses should be reduced by this amount. (City's brief, pp. 95-96).

The trial court held that the law under which the Company is operating (Chapter 278, General Laws Minnesota, 1921) contemplated that the expense of rate litigation should be charged into operating expenses and so considered. The City objects to charging attorneys' fees paid in Federal Court litigation to Operating Expenses, on the ground that to do so would encourage resort to the Federal Court. Resorting to the Federal Court is but the exercise of a right guaranteed by the federal constitution. The fee was paid. The Company was and still is trying to save its property and the expense of so doing was legitimate and a proper charge when amortized to operating expense.

D. *Expenses Connected with Rate Proceeding.*

The City complains that there was allowed in operating expenses a sum of $11,415.24, being expenses paid in connection with the rate proceeding before the Commission, and the sum of $1,060, being amount paid by the Company to the Commission for part of the Commission's expenses in connection with the proceedings before the Commission.

There is included in the sum of $11,415.24 the amount paid by the Company to the City for the City's disbursements in connection with the rate proceeding before the Commission.

That the expenses incurred in the rate proceeding before the Commission should be charged into operating costs and considered in determining what operating costs are, is provided for in Chapter 278, General Laws of Minnesota, 1921, the last paragraph of Section 9 of the Statute reading as follows:

> "All the expenses and disbursements of the city in any such proceeding, either before the Commission or court on appeal shall be borne by the street railway company as an operating expense, and shall be paid by the street railway to the city upon presentation to the street railway of vouchers showing that the same has been paid or incurred by the city; provided the amount of expenses and disbursements to be so paid shall not exceed in any one year an amount equal to One Hundred and Fifty Dollars per one thousand of population of any such city and the necessary expense incurred by the Commission in such proceedings shall also be paid by the street railway company and treated as an operating expense."

The City's population was more than 100,000, so that these expenses up to more than $15,000 are specifically provided for as a part of the Company's operating expenses. We see no basis for the City's contention that these two items are not proper operating expenses. They were paid by the Company and the law directs that they shall be charged to operating expenses. The best reason why it was proper to so charge them is that the law so directs.

E. *Snow and Ice.*

The City complains that the item of expense incurred of $9,341, for the removal of snow and ice, was excessive in amount of $4,341. (City's brief, pp. 100-101).

The expenses for the twelve month period ending July 31, 1923 was taken as the period upon which to compute operating expenses (Rec. p. 718). It is a matter of common knowledge that the operating expenses on various items fluctuate. The expenses of removal of snow and ice will be higher than the average in one year, while the expenses for other items may be lower. The item of cleaning and sanding track might be higher than the average. The item of track and roadway labor might be higher than the average. The item of heating cars might be higher than the average. No claim is made by the City that the operating expenses considered as a whole do not fairly represent the average experience of the Company over a period of years. The City attempts only to pick out this one item and say that it is higher than the average over a period of five years. The amount was actually expended. Relative to snow and ice, the experience of the Company over the past seven years immediately prior to the hearing was that the average actual expenditures for that item had been $7,097.01 per year. The tendency for the amount expended in connection with the removal of snow and ice is to increase as the business section of the city enlarges and the removal of snow covers greater territory. The manager of the Company does not believe that th amount expended for removal of snow and ice will run under $8,000 or $9,000 in future years. (Rec. p. 689).

The Master, relative to charges for removal of snow and ice, and for expenditures for bridges, trestles and culverts, stated:

> "No deduction is made because of the last two items. It is not claimed that the amounts were not actually expended and to reduce them because of comparison with other years or an average of other years seems too conjectural." (Rec. p. 720).

F. *Bridges and Culverts.*

The City also contends that the amount expended on bridges and culverts is excessive in amount of $2,203.92.

No claim is made but what this amount was actually expended by the Company. This item falls in the same category as the item for removal of snow and ice. The twelve month period used as a test period in which to determine operating expenses was a fair period, and while expenses on one particular account may be higher than the average over a period of few years, the expenses on other items might be lower. Operating expenses fluctuate and do not remain at any fixed level.

The City, on page 102 of its brief, summarizes its claim that operating expenses should be decreased in amount of $92,003.35 and this is made up of the claims hereinbefore set forth under headings A to F inclusive. In answer to the City's contentions, we say:

Depreciation was computed on the basis of 2½% on the undepreciated value of the depreciable property. This was proper.

The increased expenses, due to increased service on the West Third Street Line, was more than off-set by increased revenue.

The attorneys' fees paid in connection with the Federal Court litigation was a proper allowance in connection with operating expenses.

The expenses incurred in proceedings before the Commission in connection with rate matters and expenses of the Commission in connection therewith, paid by the Company, are proper items of operating expenses and are directed by statute to be charged into operating expenses.

highly profitable enterprises or speculative ventures. Th return should be reasonably sufficient to assure confi dence in the financial soundness of the utility, and shoul be adequate, under efficient and economical managemen to maintain and support its credit and enable it to rais the money necessary for the proper discharge of its pub lic duties. A rate of return may be reasonable at on time, and become too high or too low by changes affect ing opportunities for investment, the money market, an business conditions generally."

In the *Indianapolis Water Co.* case, recently decided, thi court said:

"It is obvious that rates of yield on investments i bonds plus brokerage is substantially less than the rat of return required to constitute just compensation for th use of properties in the public service. Bonds rarely cor stitute the source of all the money required to financ public utilities. And investors insist on higher yield on stock than current rates of interest on bonds.

"Obviously, the cost of money to finance the whol enterprise is not measured by interest rates plus brok erage on bonds floated for only a part of the investmen The evidence is more than sufficient to sustain the rat of 7% found by the commission. And recent decision support a higher rate of return." Citing a large numbe of cases.

In the case at bar the Commission, the Master and th trial court have all agreed upon the rate of 7½% as bein reasonable. The Commission is not now contending tha the rate of 7½% was too high. The Company contended be fore the Commission and before the court that the rate shoul be not less than 8% and its evidence fully justified this rat

In addition to the cases cited by this court in the *India apolis Water Company* case, we refer to the following dec

sions of commissions and courts made in the year 1922, all of which have given a rate of return of 8% or more. No attempt has been made to make this list exhaustive but only to make it illustrative:

Re: *City of Flint* (*Mich.*) P. U. R. 1922 A, 385 ..... 8%
Re: *Franklin Light & Power Co.*, (N. H.) P. U. R. 1922A, 506 ..... 9½%
Re: *Utica Gas & Elec. Co.* (*N. Y.*) P. U. R. 1922 A, 147 ..... 9½%
Re: *Tuscon Gas Elec. Light & Power Co.* (Ariz.) P. U. R. 1922 C, 658 ..... 9%
Barth v. Hughes & D. Elec. Co. (*N. D.*) P. U. R. 1922 A, 740 ..... 8%
Re: *San Joaquin Light & Power Co.* (*Cal.*) P. U. R. 1922 D, 595 ..... 8.29%
Libby v. Libby Water & Elec. Co. (*Mont.*) P. U. R. 1922 E, 402 ..... 8%
Re: *Plymouth Elec. Light Co.* (*N. H.*) P. U. R. 1922 B, 467 ..... 8%
Re: *Page Lighting Plant*, (*N. D.*) P.U. R. 1922 A, 652 ..... 8%
Re: *Rose Milling Company*, P. U. R. 1922 A, 587 ..... 8%
Re: *Oconto Service Co.*, P. U. R. 1922 E, 130 ..... 8%
Re: *Rio Electric Co.*, (*Wis.*) P. U. R. 1922 E, 764 ..... 8%
Re: *Los Angeles Gas & E. Corp.* (*Cal.*) P. U. R. 1922 A, 283 ..... 9%
Stamford v. Stamford Gas & E. Co., P. U. R. 1922 A, 303 ..... 8%
Re: *Lansing Fuel & Gas Co.*, P. U. R. 1922 B, 605 ..... 8%
Re: *Eaton Rapids* (*Mich.*) P. U. R. 1922 D, 94 ..... 8%
Re: *Webb City & Carterville Gas Co.* (*Mo.*) P. U. R. 1922 C, 608 ..... 8%
Re: *Lynchburg Traction & Light Co.* (*Va.*) P. U. R. 1922 B, 737 ..... 9%

LaCrosse v. Wisconsin-Minnesota Light & P. Co., P. U. R. 1922 B, 113 ..... 8%
Green Bay v. Wisconsin Public Service Co., P. U. R. 1922 B, 671 ..... 8%
Re: Wisconsin Gas & Elec. Co., (Wis.) P. U. R. 1922 C, 829 ..... 8%
Re: Wisconsin Minnesota Light & Power Co., P. U. R. 1922 D, 131 ..... 8%
Winona v. Wisconsin Minnesota Light & P. Co., 276 Fed. 996 ..... 8%

VII.

Income Required and Estimated Revenue.

The trial court found the value of the property as of December 31, 1921 $5,009,510 and found that the Company was entitled to an annual rate of return of 7½% upon its value, amounting to $375,713.25. The Master found annual operating expenses of $1,191,024. This amount was approved by the trial court. The evidence showed revenue other than from passengers of $15,202. Tabulating these figures, we have:

Rate base	$5,009,510.00
Return at 7½%	373,713.25
Operating Expenses	1,191,024.00
Gross Revenue required	$1,566,737.25
Revenue other than passenger	15,202.00
Passenger revenue required	$1,551,535.25

The Commission found that it was necessary to make an increase of rate of fare that would produce approximately $95,000.00 (Rec. p. 26). The Commission assumed 27,030,000

passengers would be carried annually. To produce an increase of $95,000.00 in revenue with 27,030,000 passengers would require an increase in the rate of fare of a little more than one-third of a cent for each passenger. One-third of a cent would produce $90,100.00 and therefore the Commission assumed that more than one-third of the passengers would pay the cash rate of six cents.

The evidence of the Company showed that in the City of Columbus, Ohio, the identical rate fixed by the Commission in its order was in effect. That for the year 1921 the cash passengers on the same rate of six cents cash and five tickets for twenty-five cents was 6.62% of the total number of passengers and the average rate of fare 5.04 cents. That for the year 1922, under the same rate schedule, the ticket passengers were 92.16%, leaving for cash but 7.84% and that the average cash paid per passenger was 5.08 cents. That for six months of 1923 the percentage of cash passengers was 7.11% of the whole and the average cash per passenger was 5.07 cents.

To produce the passenger revenue required, of $1,551,535.25, at the rate assumed by the Commission of 5 1/3 cents per passenger would have required 29,000,000 plus of passengers; at the rate of 5.08 cents, the highest rate shown by the experience of the Columbus company, to produce the revenue required would have taken 30,500,000 plus, but the actual number of passengers carried during the first year after the Commission's order was 25,384,100 or approximately 4,000,000 fewer than necessary, even on the Commission's estimate of the number of passengers that would have paid the cash fare, and more than 5,000,000 fewer than would have been necessary if this company had had the same experience as to the percentage of cash paying passengers that was had by the Columbus company.

VIII.

Conclusion.

We think that we have demonstrated that the court had jurisdiction, that the action was not premature, that the value found by the court was too low, that the rate of return fixed by the Commission and approved by the Master and the Court was not too high, operating expenses as found by the Master and approved by the court were entirely supported by the evidence, and that the rate of fare of six cents cash and five rides for twenty-five cents was entirely insufficient and if put into effect would have resulted in confiscating the Company's property.

We think the decree was right and should be affirmed.

Respectfully submitted,

OSCAR MITCHELL
W. D. BAILEY
H. A. CARMICHAEL
Solicitors for Appellee,
1200 Alworth Building,
Duluth, Minnesota.

COMPLAINANT'S EXHIBIT 32.

THE DULUTH STREET RAILWAY COMPANY—DULUTH DIVISION
COMPARISON OF COST OF REPRODUCTION NEW AS ESTIMATED
BY A. L. DRUM & COMPANY AND BYRON T. GIFFORD.

	——Basis No. 1——		——Basis No. 2——		——Basis No. 3——		——Basis No. 4——	
	A. L. D.	B. T. G.	A. L. D.	B. T. G.	A. L. D.	B. T. G.	A. L. D.	B. T. G.
Inventoried property (excluding land and material and supplies)	$3,488,161	$3,488,161	$4,864,437	$4,864,437	$6,308,966	$6,308,966	$3,487,020	$3,487,020
Land	150,735	118,094	150,735	118,094	150,735	118,094	150,735	118,094
Material and supplies	105,787	105,787	105,787	105,787	105,787	105,787	105,787	105,787
Total inventoried property	$3,744,683	$3,712,042	$5,120,959	$5,088,318	$6,565,488	$6,532,847	$3,743,542	$3,710,901
Expenditures not apparent	6,385		6,385		6,385		6,385	
Total	$3,751,068	$3,712,042	$5,127,344	$5,088,318	$6,571,873	$6,532,847	$3,749,927	$3,710,901
Engineering and superintendence	187,553		256,367		328,594		187,496	
Administration, organization and legal	187,650		187,650		187,650		187,496	
Taxes during construction	50,454		56,417		80,054		50,454	
Interest during construction	334,138		450,222		573,454		334,042	
Total	$ 759,795	$ 369,641	$ 950,656	$ 560,535	$1,169,752	$ 899,788	$ 759,642	$ 369,524
Working capital	87,312	24,213	87,312	$ 24,213	87,312	24,213	87,312	24,213
Total	$4,598,175	$4,105,896	$6,165,312	$6,673,066	$7,828,937	$7,456,848	$4,596,881	$4,104,638
Cost of financing	229,909	89,075	308,266	185,504	391,447	249,030	229,844	89,075
Total physical property	$4,828,084	$4,194,971	$6,473,578	$5,858,570	$8,220,384	$7,705,878	$4,826,725	$4,193,713
Developmental costs	1,129,935	400,000	1,261,574	400,000	1,401,319	400,000	1,129,826	400,000
Total	$5,958,019	$4,594,971	$7,735,152	$6,258,570	$9,621,703	$8,105,878	$5,956,551	$4,593,713
Cost of power contract	379,542		379,542		379,542		379,542	
Grand Total	$6,337,561	$4,594,971	$8,114,694	$6,258,570	$10,001,245	$8,105,878	$6,336,093	$4,593,713

IX.

Supplemental Statement and Brief.

On October 4, 1926 the Railroad and Warehouse Commission of Minnesota made its order, effective October 15, 1926, in a proceeding in which both the Company and the City were parties, copy of which is printed herewith for the information of the Court and for such consideration as the Court deems proper.

This order was made in a proceeding pending at the time the briefs herein of the Commission and of the City were prepared and in both of the briefs the expected order is referred to and claim is advanced in both of them that the making of such an order would not render this action moot.

We agree that the making of this order does not render the question of the validity of the decree appealed from moot because of the coupons outstanding, which are referred to in the City's Brief.

We have been in doubt as to how this order and its contents should be brought to the attention of the court. It has not yet been published in the official reports of the Commission but will later appear in this publication. It has been published in the Public Utility Reports under the heading of "Re: Duluth Street Railway Co. (Minn.)," P. U. R. 1927 A, page 41. This is a recognized publication distributed among lawyers and the courts throughout the country.

We have considered whether the order and its contents should be brought to the attention of the court by the making of a formal motior under the rules to dismiss the appeal or affirm the decree below, as was done by the attorneys for the appellee in the *Prendergast* case, 262 U. S. 453, but in view of the decision of the court upon that motion we have doubted the expediency of that course.

We have thought that, in view of the character and nature of the order; the provisions for its publicity; the fact that it was made by one of the parties to this appeal in a proceeding to which all of the parties to this appeal were parties and the further fact that the making of such an order is anticipated in the briefs of both of the appellants, this Court would, under all those circumstances, take judicial notice of the order as to all of its contents.

If the court determines that it may consider this order under all the circumstances, it seems to us it removes any possible doubt as to affirming the decree appealed from for the following reasons:

1. This later order is in effect an admission by the Commission that its valuation made in the former order was too low. The former order, as pointed out in the main brief, used as a basis the values prevailing before the war and added, to give effect to increased prices prevailing at the effective date of the order, 12.99+%, while in its order of October 4th it uses as a basis of prices the average over ten years ending July 1, 1921, which were approximately 40% higher than pre-war prices.

2. The Commission found that upon a straight six-cent fare the Company would have a deficit for the year 1926 below what it was entitled to receive of $247,526.00.

3. It recognized its error in estimating the number of passengers that would be carried annually. It assumed 27,030,000 passengers would be carried annually when the actual number that was carried in the year ending July 31, 1923, was 25,384,100. The actual number carried was:

Year ending July 31, 1923	25,384,100
Year ending Dec. 31, 1923	25,014,521
Year ending Dec. 31, 1924	23,573,229
Year ending Dec. 31, 1925	25,149,212

With reference to its error in estimating the number of passengers that would be carried, the Commission said:

> "The continued increase in the use of automobiles resulting in a downward trend in street railway passengers, continues to perplex operating officials and regulatory commissions in seeking a basis for stabilizing street railway fares. The difficulties which confronted the industry and were pointed out in 1920 in the report of the Federal Electric Railways Commission to the President, and which arose largely from increase in operating costs, have been augmented by this continued increase in the use of the private automobile. In the different proceedings relative to street railway fares which have confronted us since the passage of Chapter 278, Session Laws of 1921, this Commission has from time to time been optimistic and in each case hoped that the depressing effect of the use of automobiles upon street railway operation had ended. In each instance we have been disappointed."

4. The Commission said:

> "There is no contention in this proceeding that the company is not entitled to an increase in rates,"

and then discusses the various increases suggested by the City, all of which was above six cents under the decree appealed from.

The order of the Commission allowing eight cents cash and five rides for thirty-five cents, which has been in effect since October 15, 1926, is the Commission's answer to the claim made by the City that the Commission's rate of six cents cash, five tickets for twenty-five cents, should be upheld.

The fact that the Commission in this proceeding makes no attempt to uphold its order on the merits but raises only technical objections to the jurisdiction and to the bringing of the suit before remedy under the state law had been exhausted, conclusively shows that the Commission does not consider that its order can be upheld upon the merits.

BEFORE THE RAILROAD AND WAREHOUSE COMMISSON OF THE STATE OF MINNESOTA

In the Matter of the Application of The Duluth Street Railway Company for increase in rate of fare.

On July 31st, 1925 the Duluth Street Railway Company filed its application with the Railroad and Warehouse Commission pursuant to Chapter 278, Session Laws 1921, praying that the Commission:

1. Fix and establish the fair value of the street railway property of petitioner within the City of Duluth as an operating system;

2. Fix and establish rates of fare to be charged by petitioner for carrying passengers within the City of Duluth under and in accordance with the terms of Chapter 278, Laws of Minnesota for 1921, which rates of fare shall yield to petitioner a reasonable return on the fair value of the street railway property within the City of Duluth as an operating system.

The matter came on for hearing pursuant to notice duly given, in the Cty of Duluth on June 23rd and 24th, 1926. Washburn, Bailey & Mitchell, Attorneys, of Duluth appeared for the Duluth Street Railway Company by Mr. Oscar Mitchell; Hon. John B. Richards, City Attorney, appeared for the City of Duluth.

Witnesses vere heard and evidence received. Mr. A. L. Drum, Engineer, gave testimony and presented exhibits for the Company, and Mr. H. E. McWethy, Engineer for the City. The interested parties filed briefs, report was made by the

Statistical Department of the Commission and the matter is now before us for decision.

On July 13th, 1922 this Commission entered its order on a similar application heard by us in January, 1922. Our order at that time found the value of the property of the Duluth Street Railway Company within the City of Duluth as of December 31st, 1921 to be $4,599,978.22. We fixed and established by such order a rate of fare effective August 1st, 1922, of 6 cents cash fare, five rides or tokens to be sold for 25 cents. Our order was appealed by the City of Duluth to the District Court of St. Louis County; no hearing on such appeal has been had.

The Duluth Street Railway Company immediately applied to the United States District Court for the District of Minnesota for a temporary and permanent injunction restraining the enforcement of the order, on the ground that such rate of fare as so fixed by this Commission was a deprivation of its property rights under the 14th Amendment to the Constitution of the United States. A temporary injunction was issued restraining the Commission from interfering with the collection by the company of any fare not greater than 6 cents cash per passenger, and the Court referred the matter to a master in chancery, who took evidence and made his report. On the 24th day of January, 1925, the United States District Court issued its final decree, enjoining the Commission from enforcing or attempting to enforce the schedule of rates and charges prescribed in its order of July 13th, 1922, and from interfering with the Duluth Street Railway Company charging a rate of fare for carrying passengers within the City of Duluth not exceeding 6 cents for each passenger, upon the condition, however, that until the establishment by the Railroad and Warehouse Commission of just and reasonable rates of fare for the transportation of passengers upon the streetcars in the city of Duluth, or until the further order of the Court, the company should not charge more than

6 cents for one continuous trip of each passenger upon its streetcars within the City of Duluth. (Duluth Street Railway Company vs. Minnesota Railroad and Warehouse Commission, 4 Fed (2d) 543). Separate appeals were taken from this decree by the City of Duluth and by the Attorney General of the State of Minnesota for himself and the Railroad and Warehouse Commission to the United States Supreme Court. Such appeal has not yet been heard.

Subsequent thereto and on July 31st, 1925, the application herein was filed by the Duluth Street Railway Company. The City of Duluth thereupon applied to the District Court of St. Louis County for an injunction to restrain the Railroad and Warehouse Commission from hearing and considering the petition so filed. The District Court of St. Louis County dismissed such application, and the judgment of dismissal in such court was affirmed by the Supreme Court of the State of Minnesota by its decision handed down May 14th, 1926, (City of Duluth vs. Railroad and Warehouse Commission, 209 N. W. 10). The petition of the Duluth Street Railway Company was then set down for hearing at the City of Duluth for June 23rd, 1926.

Considerable space in the briefs of the Duluth Street Railway Company and of the City of Duluth is devoted to the contention of the company that the final decree of the Federal court entered on January 24th, 1925 (4 Fed. (2d) 543) is binding upon this Commission as res adjudicata of the fair value of the company's property as of December 31st, 1921 at $5,009,510, and the reasonable rate of return thereon at 7½%. Measured by the results that we will arrive at from the evidence in this case, the point is not especially important. However, as our findings herein are not based upon any such assumption, we state that we cannot sustain the contention. Chapter 278, Session Laws 1921 imposes upon the Commission in a proceeding of this character the duty to appraise the property of the street railway company and "to fix and deter-

mine the fair value thereof" and to "fix and establish rates of fare". No such duty rests upon the Federal court. As stated by Judge Booth in his opinion upon the Company's application:

> "The proceedings before the special master and in this court are not for the purpose of fixing a rate but to determine whether the rate fixed by the Commission is confiscatory. In Pacific Gas & Electric Company vs. City and County of San Francisco, 265 U.S. 403, the court said, 'Rate making is no function of the courts. Their duty is to inquire concerning results and uphold the guarantees which inhibit the taking of private property for public use without just compensation under any guise'." (4 Fed. 2d 546).

The Federal court would have had no concern with the value fixed by this Commission had the prescribed rate of fare yielded sufficient net income to escape confiscation. Sufficient net income could have been yielded under the Commission rate of fare upon the value that was fixed by the court if the Commission had under-estimated the future net income, or had the number of revenue passengers actually exceeded the estimate of the Commission to such an extent as to yield the needed net income. In either case the Federal Court would have no cause to disturb our findings of value or grant an injunction; therefore there would be no judgment except dismissal, although the court would have undoubtedly made the same finding of value and rate of return that it did.

Judge Booth, quoting Section 9 of Chapter 278, Laws of Minnesota 1921, referred to the duty of the Commision to fix a rate of fare which would yield a reasonable return on the fair value of the street railway property, and then stated:

> "The Fourteenth Amendment to the Constitution of the United States provides a guarantee against a confis-

catory rate. The maximum and minimum are therefore fixed; within the space between if there is any such space, the action of the Commission is unassailable."

The Supreme Court of the United States in Banton vs. Belt Line Railway Corporation (45 Supreme Court Reporter 534) has, since the opinion was handed down in the District Court, stated that there is a space between what may be a reasonable rate and a non-confiscatory rate. It was there said:

"A Commission or other legislative body, in its discretion, may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a judicial finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property used to perform the service covered by the rate. *The mere fact that a rate is non-confiscatory does not indicate that it must be deemed to be just and reasonable.* It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate."

We cite this as bearing upon the point that the duty of the Federal court under the Fourteenth Amendment is concerned only with the confiscatory nature of the rate and its findings as to value and rate of return are not binding upon the regulatory commission as would be the decree of our own courts in the event of an appeal from an order of the Commission under Chapter 278, Laws 1921. (See City of Duluth vs. Railroad Commission, 209 N. W. 10).

However, the evidence in this case is without dispute that unit values of the property existing as of December 31st, 1921 have not changed to any appreciable extent. This state of the evidence in the proceeding makes it necessary to con-

sider those items of property in our former valuation to which, in the opinion of the Federal court, we failed to give proper consideration. The final figure which we found to be the fair and reasonable value of the property of the company in our former order as of December 31st, 1921 was $4,599,978.22. The court, stating that the parties were entitled to its independent judgment upon the findings and conclusions of the Commission, considered a fair rate base as shown by the evidence before the court to be $5,009,510.

The court in arriving at this figure used what it termed an "undepreciated cost of physical property items, excluding land, $3,493,405". Of this amount the court found $2,830,189 (see page 9, Exhibit 2) represented property investment installed at pre-war prices, which it determined should be increased 40%, or $1,132,075 to give effect to increased price levels, and thereby arriving at a modified undepreciated value of $4,625,480. The Commission used a figure "physical property undepreciated, excluding land, of $3,940,000". The court stated:

> "It is my opinion, therefore, based upon the evidence, and in view of the decisions of the courts, that sufficient consideration was not given to the increase in prices in the past few years."

This makes it necessary for us to further consider the value of the physical property as of July 1st, 1921.

We are not at liberty to accept the figure of $4,625,480 used by the court, for there is no evidence before us from which we could determine his base figure of $2,830,189 or from which we could adopt the judgment of the court in adding 40% thereto to account for increase in prices. We are also concerned with the future accounting of the company and the court's figures furnish no value of units of the property which could be properly distributed.

We had before us agreed figures of the city and company engineers upon the following bases:

1915 Prices	$3,488,161.00
Ten Year Average (1912-1921)	4,864,437.00
1921 Costs	6,308,966.00
Reproduction or Investment Basis	3,487,020.00

In order to give proper consideration to the increase in prices wherein the court stated we failed in arriving at the value of the physical property, we must do so from the evidence that was before us, and cannot draw from the record before the Federal court or adopt arbitrarily a percentage increase which was the court's independent judgment.

In our order fixing the value of the property of the Minneapolis Street Railway Company as of date January 1st, 1922, we stated our conclusion as follows:

> "We have reached the conclusion that unit prices for construction for the ten year period 1912 to 1921 inclusive, as applied to the inventory of physical property as of January 1st, 1922, fairly reflect the undepreciated present value of the physical property of the Minneapolis Street Railway Company, except as to rolling stock and paving."

The unit prices there adopted were compiled by the same engineer who appeared for the Duluth Street Railway Company and testified in support of the company's application herein, and which unit prices were approximately the same as those used in the ten year average for the Duluth Street Railway Company.

The unit prices adopted in our valuation of the Minneapolis Street Railway Company were also used in arriving

at the value of the St. Paul City Railway Company for its property as of date January 1st, 1924.

What we said in our orders determining the value of the Minneapolis Street Railway and the St. Paul City Railway in excepting rolling stock and paving in adopting the ten year unit prices, is applicable to the same items in the Duluth Street Railway property, as is also our statement there relative to unit prices for 1911 to 1915 reflecting the fair value of the items of rolling stock and paving, as applied to the 1915 prices for those two items of the Duluth Street Railway Company. We shall use the ten year average prices for all items of the inventory of the physical property of the Duluth Street Railway Company, except as to rolling stock and paving, in which we will use the 1915 prices in determining the fair value of the property of the Duluth Street Railway Company as of December 31st, 1921.

CONDITION PER CENT

In our order of July 13th, 1922 in making allowance for the depreciated condition of the property upon the estimated cost of the same new, we used a percent of eighty-three (83). This percent was also used by the master and by the Federal court. The engineers in the proceeding herein have testified that the condition of the property has changed little if any and is in somewhat slightly better condition than at the time of the former hearing. We shall use a condition per cent of 83 in determining the present value.

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FAIR VALUE

We have then for the fair value of physical property (excluding land) as of July 1st, 1921:

Cost new, based upon 10 year (1912-1921) average		$4,864,437.00
Deduct (1912-1921) Paving	$ 156,907	
Rolling Stock	1,214,717	1,371,624.00
Total		$3,492,813.00
Add (1915) Paving	$ 138,472	
Rolling Stock	821,645	960,117.00
Total undepreciated value		$4,452,930.00
Less 17%		756,998.00
Depreciated Value		$3,695,932.00

This figure of $3,695,932.00 (Depreciated value of physical property as of July 1st, 1921, excluding lands and overheads) is comparable with the figure adopted by the court of $3,839,149.00.

Subsequent to July 1st, 1921, property additions and retirements have been made as follows:

Net Additions July 1, 1921 to December 31, 1921		$ 6,978.00
Gross Additions December 31, 1921 to December 31, 1925		643,457.00
		$650,435.00
Deduct 17% for depreciation		110,574.00
Present value total additions		$539,861.00

For this period July 1st, 1921 to December 31st, 1925,

the gross property retirements amounted to $208,059.00. The parties agree that these retirements should be increased to the basis of the Commission's value. To adjust the retirement original cost to the above depreciated value base, the original cost of retirements must be increased 6.22% or $13,777.00, making a total for retirements of $221,836.00.

Deducting from Present Value Total Additions	$ 539,861.00
Net Retirements	221,836.00
Net Increase in Property—Total	$ 318,025.00
Add Depreciated Value of Property July 1, 1921	3,695,932.00
Depreciated Value of Physical Property excluding Lands, December 31, 1925	$4,013,957.00

GENERAL OVERHEADS

In our order of July 13th, 1922, we determined the undepreciated value of the general overheads to be $550,000, such amount being 14% of the undepreciated value of the physical property. We depreciated the $550,000 by 17% and included the result at $456,500 for general overheads. The United States District court rejected our item for general overheads which was arrived at by applying a resulting total percentage to a base cost which was held to give insufficient recognition to increased prices, and accepted an estimate which gave *no* recognition to increased prices. Why effect should be given to increase in price of labor which enters into the physical property, and no effect given to increase in the price of engineering and superintendence (an item of general overheads) entering into the same structure, we are at a loss to understand. Having elected to build our rate base in a manner that will permit of segregation of the units from the

engineering figures before us, we shall follow through in the matter of overheads.

In the Minneapolis and St. Paul Street Railway finding of value, after an exhaustive study, we determined the percentage that each class of general overhead expense bore to the fair value base of the physical property, as follows:

(1) Engineering and Superintendence 4.5%
This percentage to be applied to the fair value base excluding Land, Expenditures not apparent in Inventory and General Stores.

(2) Administration, Organization and Legal Expense 3.0%
This percentage to be applied to the same fair value base as Engineering and Superintendence.

(3) Taxes During Construction 5%
This percentage to be applied to the same fair value base as Engineering and Superintendence.

(4) Interest During Construction 5.0%
This percentage to be applied to all property, excluding Land, but including General Stores, Expenditures not Apparent in Inventory, Engineering and Superintendence, Administration, Organization and Legal Expenses, and Taxes during Construction.

We have adopted these overhead percentages in this case and find the proper amount for General Overheads to be $495,255.00. For physical property, including overheads but excluding land, we have a value as of July 1, 1921 of $4,191,187.00, as compared with the court's finding for the same items of $4,208,683.00.

LANDS

In our former order we found the fair value of lands to be $140,000.00. The master in his report to the Federal court recommended a deduction of $7,180.00 for land made use of by the Superior portion of the system. He also allowed the sum of $31,754.00 for value of lands used by the incline railway in lieu of the sum of $46,000.00 allowed by us, making a total valuation for lands of $128,474.00. Such value was accepted by the court. We will make the deductions recommended by the master to the court and determine the value of lands at $128,474.00.

WORKING CAPITAL, MATERIAL AND SUPPLIES

There was no difference in the findings of the Commission, the recommendations of the master or the decision of the court as to the item of working capital, material and supplies, the same being $135,000.00. That figure will stand.

COST OF FINANCING

The court allowed an item of $89,075.00 for cost of financing, which was the figure recommended by the master as being an actual expenditure. The Commission had made no direct allowance for this item, stating that the same would be given consideration in the rate of return. We herein follow the direction of the court that cost of financing is an item properly included in the value of the property, and accept the court's figure of $89,075.00. It is indicated by the court that expenditures for cost of financing where shown must be allowed. In addition to the above item there has been expended the sum of $25,169.00 in financing the sale of stock author-

ized by us since our former order. We shall allow this item in addition to that fixed by the court, making a total of $114,244.00.

GOING VALUE

We allowed $500,000.00 for going value. The master and the court adopted a figure of $350,000.00. We accept this latter figure.

POWER CONTRACT

We allowed an item of $91,300 being the unamortized value of a power plant which had been dismantled by reason of the company entering into a contract for its power. This item was disallowed by the master but included by the court. The contract expires in 1931, and in accordance with the method adopted in valuing the contract in our former order, is less valuable today by reason of the expiration of the years from 1921 to 1926. We accordingly find the value of the same to be $54,780.00.

Summarizing the foregoing items of value as of December 31st, 1925, we have the following:

Physical Property, excluding Lands	$4,013,957
General Overheads	495,255
Lands	128,474
Working Capital, Materials and Supplies	135,000
Cost of Financing	114,244
Going Value	350,000
Power Contract	54,780
Total Commission's Fair Value	$5,291,710

We therefore fix, determine and find the fair value of the street railway property of the Duluth Street Railway

Company within the City of Duluth, as an operating system, as of December 31st, 1925, to be $5,291,710.00.

ANNUAL DEPRECIATION

In our order of July 13th, 1922, we made an allowance for Annual Depreciation of $115,000, stating that we adopted 2½% of the depreciable property as a basis for the figure. In the proceeding in Federal court upon that order the master allowed the same sum, with the statement that "if an allowance for depreciation is intended to restore investment, the Commission computed depreciation upon an excessive amount but in any event $115,000 is sufficient." The court in approving the master's allowance stated that "the item of annual depreciation of $115,000 cannot be considered excessive in view of the modified valuation above given." We are unable to determine whether the court approved or disapproved the master's criticism of the Commission's method of arriving at the $115,000. The master's statement evidently was made upon the theory that the Commission had applied its percentage to other than the cost value of the depreciable property. If such was the fact, the criticism was well made, as the purpose of setting up depreciation is to restore investment. While on the other hand, the statement of the court would lead to the conclusion that he was of the opinion a change in the valuation base affected the amount of the depreciation allowed. Whether either the master or the court considered that the percentage figure used was too low does not appear. We have the statement of one that the amount is "sufficient" and of the other that it "cannot be considered excessive". The testimony of the engineer of the city in the present proceeding was to the effect that "an annual charge to operating expenses at the present time of $115,000 is a reasonable and just charge."

We have referred to the testimony and the statements of

the master and court in order to set forth fully the circumstances surrounding the revision we shall make in this item of annual depreciation.

The company sets up its depreciation on a 4% sinking fund basis, and for the year 1925 charged to operating expenses for this purpose the sum of $143,357. We stated in our order of July 13th, 1922 that "it appears that the amount set aside for depreciation reserve and charged in operating expenses the past five years has on the whole been somewhat in excess of the requirements of the company". This statement still is true taken in connection with the purpose for which we make an allowance for annual depreciation chargeable to operating expenses in arriving at a rate of fare. We are not criticizing the sinking fund method used by the company which is set up on a proper basis, but the company's annual charge for depreciation to operating expenses on that basis is not a proper sum to allow as the basis for a rate order.

In our former order we stated that in the years 1917 to 1921 the balance in the reserve fund for depreciation had increased from $537,139.11 to $972,806.38. The balance in the depreciation reserve on December 31st, 1925 was $1,322,-384.95, an average annual increase from 1917 to 1925 of $87,249.00. This would seem to indicate that the company is either charging an excessive amount to operating expenses for depreciation or is failing to charge to its depreciation reserve the proper amount for retirements. Our findings and the testimony of the engineers do not indicate that the condition of the property is being allowed to depreciate through failure to replace or retire wornout units.

The original cost of the depreciable property as of December 31st, 1925 which the company uses as a basis for setting up its depreciation on the sinking fund basis is $3,531,-962.59. This is the cost of the property upon which the company is entitled to make a charge to operating expenses for

replacements. As stated by the Supreme Court of the United States in the case of Knoxville vs. Knoxville Water Company, 212 U. S. 1:

> "Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The Company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the *original investment* remains as it was at the beginning."

The necessity of restricting the allowance for annual depreciation to an amount not exceeding that sufficient to replace the property at its "original investment" cost is forcibly illustrated by the decision of the Supreme Court of the United States in Board of Utilities Commissioners vs. N. Y. Tel. Co. (46 Sup. Ct. Rep. 363). It is there said:

> "The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses including the expense of depreciation is the company's compensation for the use of its property."

In the Minneapolis and St. Paul street railway proceedings we found that those companies were setting aside for annual depreciation aproximately 2½% of the book cost of depreciable property, and allowed such amount in determining the rate of fare.

In view of all the circumstances and the evidence in the

proceeding we will not restrict the allowance for annual depreciation to the mathematical 2½% on the cost of the depreciable property, but will make an allowance in operating expenses of $100,000 for annual depreciation, having in mind the claims of the company in connection with cost of motor vehicle service operated as an auxiliary to its street railway service and which will be commented upon hereafter.

COACH COMPANY CONTRACT

Included in the Company's estimated operating expenses for 1926 is an item of $12,545.63, representing the estimated operating loss of the Duluth-Superior Coach Company apportioned and charged to the Duluth Street Railway Company in accordance with the terms of certain contracts (Exhibits 7 and 8). The Duluth-Superior Coach Company is an Auto Transportation Company operating pursuant to Chapter 185, Session Laws of Minnesota, 1925 under order of this Commission dated April 17th, 1926. The coach company is owned and controlled by the Duluth-Superior Traction Company, the holding corporation of the Duluth Street Railway Company. The charge to operating expenses of $12,545.63 for 1926 is claimed under paragraph 3 of exhibit 7, being contract dated December 31st, 1925, reading as follows:

> "The Street Railway Company agrees that in the event the net earnings of the Coach Company in any one year do not equal 7½% upon the actual cash investment of The Duluth-Superior Traction Company in the capital stock of the Coach Company, as provided in paragraph 2 hereof, applicable to the automobile coaches operated by the Coach Company within the limits of the City of Duluth, the Street Railway Company will, on or before March 15th of the succeeding year, pay to the Coach Company a sum sufficient, which, when added to the net earnings of the Coach Company for the preced-

ing year, will equal 7½% upon the actual cash investment of the Duluth-Superior Traction Company in the capital stock of Duluth-Superior Coach Company, applicable to the automobile coaches operated by the Coach Company within the city limits of the City of Duluth."

The Coach Company operates motor vehicles over four different described routes, as follows:

1—Duluth-Superior route
2—Morley Heights route
3—Calvary Cemetery route
4—Fond du Lac route

With the exception of the Duluth-Superior route, all of these routes may be termed auxiliary service to the street railway, connecting with the lines of the street railway, and as to two of the same, the Morley Heights and Fond du Lac routes, transfer privileges are accorded between the vehicles of the Coach Company and the cars of the Duluth Street Railway Company.

The furnishing of service by motor vehicle in conjunction with a street railway, either by itself or through contract with a subsidiary company is not only proper but as to the three routes mentioned, required and economical. The operation of the Fond du Lac route by the Coach Company was brought about by the Duluth Street Railway Company at the instigation of this Commission. If these three routes were operated directly by the street railway company so that the proper charges for their operation appeared in the records before us, or if the contract before us determined the proper basis of the cost of the service, we would have no hesitancy in allowing the same as a proper charge to street railway operation. However, we can find no legal grounds for a charge to operating expenses of the street railway company of an amount based upon the theory of guaranteeing to the Coach

Company a specified return. Neither does the evidence enable us to determine what a proper charge should be. We are not prepared to say the claim of $12,545.63 would be excessive. We will not, however, include the item but as stated under our discussion of annual depreciation, we had this situation in mind when endeavoring to make an equitable allowance for annual depreciation.

OPERATING EXPENSE

Our analysis of operating expense discloses several necessary adjustments in order to arrive at an annual amount that might be termed normal. The adjustments occur in the accounts for removal of snow and ice, advertising, law expense and valuation expense. This latter account for 1925 includes an item of $11,415.24, being the annual sum necessary to amortize the expense under our order of July 13th, 1922 over a period of five years. This amount should be taken out and replaced with an annual allowance of $3,883.84 to amortize the estimated expense of $19,419.00 under the present proceeding, including balance not charged off under the former. We amortize the expense on a five year basis.

With these adjustments we have a normal annual operating expense and taxes of $1,282,877.00, which is fair and reasonable, summarized as follows:

Actual 1925 excluding depreciation adjusted to include additions for:		$1,041,147
Annual increase in wages	$31,581	
Removal of snow, sand and ice	1,658	
Total increase	$33,239	
Reduction in charges for:		
Advertising	$ 978	
Law expenses	2,776	
Amortization of Valuation Expense:		
Actual charges for 1925 $11,415.24		
Less annual allowance of 3,883.84		
Current allowance 2,116.16		
	5,415	
	$ 9,169	
Net Additions		24,070
Total Normal Operating Expense (Excluding Depreciation)		$1,065,217
Annual Depreciation		100,000
Total Operating Expense		$1,165,217
Taxes		117,660
Total Operating Expense and Taxes		$1,282,877

RATE OF RETURN

In our order of July 13th, 1922, in fixing and determining a rate of fare we found a rate of return of 7½% to be reasonable. This rate of return was accepted by the master in the proceedings in Federal court and found fully justified by the court. The evidence in the proceeding is conclusive that a smaller rate of return would not be justified. We accordingly find 7½% to be a reasonable rate of return in fixing and determining the rate of fare herein. In doing so we have in mind the rule as annunciated by the Supreme Court of the United States in Banton vs. Belt Line Railway Corporation

as heretofore referred to, that a just and reasonable rate may be "substantially higher than the line between validity and unconstitutionality".

REVENUE PASSENGERS

In our order of July 13th, 1922, we had before us the record of passengers carried in 1921 of 27,246,916 and the record for the first four months of 1922 showing a slight reduction. We used as an estimated number of passengers in arriving at the rate of fare, 27,030,000. The evidence in the proceeding before the Federal court showed that the actual number of passengers for the year ended July 31st, 1923, was 25,384,100. The following is a table of passengers carried for the calendar year from 1921 to 1925 inclusive:

1921	27,246,916
1922	25,572,187
1923	25,014,521
1924	23,573,229
1925	25,149,212

The company's estimate of passengers carried for 1926 with the first four months actual is 24,193,209. The actual number of passengers carried to date of this order shows the company's estimate to be approximately correct. The company's estimate for 1927 is 23,273,867. We have no data by which this estimate for 1927 can be measured.

REVENUE REQUIRED

Using the company's estimate for 1926, to-wit: 24,193,209 passengers, we find that the present fare will produce $1,465,645 gross annual income. Deducting total operating expenses

and taxes, we have a net annual income of $182,768. To produce a return of 7½% on the fair value of the property as found by us, a net income of $396,878 is required, resulting in a deficit or failure to earn the required return by $247,526, as set forth in the following tabulation:

Total Income	$1,465,645
Operating Expenses and Taxes	1,282,877
Net Income	$ 182,768
7½% Return on $5,291,710	396,878
Deficit in Net Income	$ 214,110
Add for Federal Tax 15.607% or	33,416
Making a total deficit of	$ 247,526

To produce this increase of $247,526 in revenue, an increase per passenger fare of 1.023 cents is required.

This increase necessary to produce the required revenue, would result in a cash rate of fare slightly in excess of 7 cents.

The Duluth Street Railway Company has never operated under a rate of fare where there was a differential between the cash and the token or ticket fare. For purposes of analysis of results to be obtained under such operation, we have no data available for the City of Duluth.

There has been in operation in the cities of Minneapolis and St. Paul since the first of January, 1926, under the orders of this Commission, a rate of fare with a differential existing between the cash and the token fares. The fares there in effect are 8 cents cash, 6 tokens for 40 cents. In St. Paul the relation has been for the eight months ending August 31st, 1926, 10.89% cash, and in Minneapolis, 11.29% cash.

There is no contention in this proceeding that the company is not entitled to an increase in rates. The City suggests

several combinations of fare that will produce the required revenue, assuming different rates of return based upon a valuation less than found by us and upon a number of revenue passengers in excess of what the records show will be carried for this year. The City, taking a 6½% return upon the basis assumed, finds a needed increase in fare of 14/100 of a cent per passenger. At 7% return, finds an increase of 25/100 of a cent justified; and upon a 7½% return, finds a required increase of 35/100 of a cent per passengers. We cite these figures merely for the purpose of showing that there is no evidence in this case upon which an increase in fare could be denied, and the City's figures at which it arrives at the required increase assume a valuation of more than half a million less than found by us to be fair and reasonable, and a number of revenue passengers approximately 800,000 more than will be carried in 1926.

In our orders in the proceedings relating to rates of fare of the Minneapolis and St. Paul railways, we stated as follows:

> "In determining a rate of fare which will produce the necessary revenue to constitute a reasonable return, the equities surrounding the different classes of patrons should be taken into consideration, if any there are. It is our judgment that the patrons, insofar as the revenue obligation is concerned, fall within two groups, to-wit: the regular rider, the person who resides and works in the community and for whom the service of the street cars is specifically designed and furnished; and the transient rider, the person who uses the car only on occasion. It is the support of the former group that enables the latter group to have service at their command when their convenience demands. In rates of other utilities, such as gas and electric, a service charge is imposed which compels the subscriber to contribute to the standby service whether he uses it or not. If he uses the utility to a sufficient extent, his service charge merges into his rate; if he fails to take advantage of the service, he

pays for the privilege of having the same at his command.

To give then to the regular rider the consideration which is equitably his as a wholesale buyer, and to compel the transient rider to contribute for the privilege of having at his command service when desired, there should be a difference in the fare which they contribute to produce the service. The logical solution of the problem is a cash and token or ticket fare."

The continued increase in the use of automobiles, resulting in a downward trend in street railway passengers, continues to perplex operating officials and regulatory commissions in seeking a basis for stabilizing street railway fares. The difficulties which confronted the industry and were pointed out in 1920 in the report of the Federal Electric Railways Commission to the President, and which arose largely from increase in operating costs, have been augmented by this continued increase in the use of the private automobile. In the different proceedings relative to street railway fares which have confronted us since the passage of Chapter 278, Session Laws of 1921, this Commission has from time to time been optimistic and in each case hoped that the depressing effect of the use of automobiles upon street railway operation had ended. In each instance we have been disappointed. We are basing our order in this proceeding upon the company's estimated number of revenue passengers for 1926, trusting that the estimate of the company for 1927 will prove to be under the actual for that year.

The stabilization of the cash fare at a figure which will yield the maximum revenue from cash passengers and result in the lowest possible fare to the habitual rider is, we believe, the most logical solution of the present situation.

In determining a rate of fare which will give the utmost consideration to the welfare of the car rider and also meet the requirement of law that the fare yield a reasonable return on

the fair value of the street railway property, we have endeavored to thoroughly analyze the factors involved.

If the revenue passengers for the ensuing year should not fall below the company's estimate for 1926, and the percent of cash passengers shown by the record the Twin City lines would obtain in Duluth a token fare of six for forty cents would require a cash fare of ten cents. The Commission has seriously considered this combination.

However, taking all factors into account, it is our judgment a token fare of five for thirty-five cents with a cash fare of eight cents best meets the conditions as found to exist at Duluth.

The Railroad and Warehouse Commission of the State of Minnesota therefore fixes and establishes rates of fare to be charged by the Duluth Street Railway Company for carrying passengers within the City of Duluth, Minnesota, of eight cents cash, five (5) rides to be evidenced by tickets or tokens to be sold for thirty-five (35) cents, no change in the privileges of transfer now existing to take place.

This order to be effective on and after the 15th day of October, 1926.

By the Commission,
Thos. Yapp,
Secretary.

Dated at Saint Paul, Minnesota,
this 4th day of October A. D., 1926.
(Seal)

O. P. B. JACOBSON, Commissioner, Dissenting:

I am unable to agree with the conclusion reached by the majority of the Commission that an order should be made at this time increasing the rate of fare of the Duluth Street Railway Company. The former application of this company was filed in January, 1922, and an order was entered by the Commission on July 13th, 1922, fixing the cash fare at 6 cents, with five tokens for 25 cents. Subsequent proceedings in the United States District Court culminated in a decree entered January 24th, 1925, in which the rate of fare was in effect fixed at 6 cents for all passengers. An appeal was taken therefrom to the Supreme Court of the United States, which has not yet been disposed of.

The principal reason given for an increase in fare by the majority of the Commission is that the number of passengers carried since the former order of the Commission has decreased to such an extent as to make a higher fare necessary in order to produce a return which will be reasonable. A tabulation is given in the majority decision showing the total number of passengers for each of the five years of 1921 to 1925 inclusive. Two facts disclosed by the tabulation are of special importance. The first one is that there is a wide fluctuation in the number of passengers carried year by year. Thus, the number of passengers carried in 1924 was 23,573,229, or more than 13% less than the 27,246,916 passengers carried in 1921. The other fact of importance that the tabulation discloses is that the year 1924 with the lowest number of passengers carried during the five year period, was the last complete year preceding the filing of the final decree in the United States District Court, while the ensuing year 1925 showed a total of 25,149,212 passengers carried, an increase over 1924 of 1,575,983.

The process of establishing a valuation and fixing rates for street railways in this state is a matter involving a great amount of time and labor as well as large expense. Most of it

has to be borne by the car riders. In my opinion there should be a considerable degree of stability attached to such a valuation when made. When rates are established as in this case, after proceedings both before the Commission and the courts, they should be accepted as effective until either a definite and substantial change has occurred in price levels or sufficient time has elapsed to clearly demonstrate a decided change in conditions. According to the majority opinion the undisputed evidence is to the effect that unit property values have not changed to any appreciable extent. The showing as to the number of passengers carried does not constitute in my opinion, such a definite change in conditions as to justify increasing the rate of fare at this time. It is quite apparent that there is a wide fluctuation of such numbers from year to year in the City of Duluth. Recent tendencies have not all been downward, as appears from the comparison of 1924 and 1925. Furthermore, the adjustments made in the valuation by the majority members of the Commission are based somewhat on the conclusion of the United States District Court. It may be that the valuation used as a basis for the court's decision will not be approved by the Supreme Court of the United States when the appeal is disposed of.

Therefore, it is my opinion that before any new rate should be given the street car company the Supreme Court ought to render its decision, because after the appeal is disposed of it is probable that we shall have much more definite information upon which to proceed than at present; and my view is this, that if an increase is necessary, that this Commission should take an absolutely new valuation of the company's property; and therefore I am of the opinion that no order should be made at this time changing the rate of fare in the City of Duluth, and therefore dissent from the decision of the majority of the Commission.

SUPREME COURT OF THE UNITED STATES.

No. 228.—October Term, 1926.

The Railroad and Warehouse Commission of the State of Minnesota, O. P. B. Jacobson et al., and City of Duluth, Appellants, *vs.* The Duluth Street Railway Company.	Appeal from the District Court of the United States for the District of Minnesota.

[April 11, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree of the District Court in favor of the plaintiff, the appellee, that prohibits the enforcing of a rate for the carriage of passengers established by the appealing Commission and authorizes the plaintiff to charge not exceeding six cents for carrying passengers within the City of Duluth, subject to conditions not needing mention. 4 F. (2d) 543. The Commission's order allowed a charge of six cents for a single fare but required the plaintiff to issue tickets or tokens at not to exceed twenty-five cents for five rides. The difference, it will be seen, is somewhat narrow and the only question that we have any need to consider is whether the plaintiff had a right to come into the Court of the United States when it did, and whether its suit was not at least premature.

The plaintiff, an existing street railway company, elected to comply with and come under the terms of Chapter 278 General Laws of Minnesota, 1921, by filing the declaration and consent required. Thereby it gained a right to apply to the above mentioned Commission to fix the rates of fare to be charged in place of the five cents to which it had been limited before it came in under the Act. It applied to the Commission; the City of Duluth was made a party; and after a hearing the Commission determined the value of the plaintiff's property used and useful in the street car service in Duluth, found that a return of seven and one-half per cent. was

a reasonable rate of return, and fixed the fares that we have stated as sufficient to yield that rate. This was on July 13, 1922. Five days later the plaintiff filed this bill, setting up that the Commission's order was confiscatory and in violation of the Fourteenth Amendment of the Constitution of the United States.

The objections to the bill are based on the provisions of the Minnesota statute for an appeal. Both the city and the street railway are given the right to appeal to the District Court of the county, and there the whole matter, fact and law, is to be tried before three judges, without a jury. They are to find all material facts, including the fair value of the property and the reasonable rate of return, and to affirm, modify or reverse the order of the Commission, as may be required by law, the Commission being directed to conform to their judgment in its final order. There is a further resort to the Supreme Court. It is said that plaintiff was bound to exhaust the appeal thus granted before going elsewhere, and that it could not cut off the similar right of the City of Duluth. It is said that this is so not only on general principles but is binding on the plaintiff by its assent to the statute, which, it is said, constituted a contract and amounted to an acceptance of the statutory proceedings as the only mode of relief.

The Supreme Court of the State has declared the proceedings in Court to be judicial not legislative in their nature, and therefore consistent with the constitution of the State. *Duluth* v. *Railroad & Warehouse Commission*, 167 Minn. 311. See *Janvrin, Pet'r*, 174 Mass. 311. If then the State Court should affirm the rate fixed by the Commission and the matter should become *res judicata*, a resort to the federal Court would be too late. But the plaintiff if it prefers to entrust the final decision to the Courts of the United States rather than to those of the State has a right to do so. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 228 and cases cited. It might be said that this Court would have to exercise its own judgment as to how the proceedings in the State Court should be characterized and not impossibly might regard them as legislative. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428. Or again it might be said that however characterized the judgment does not operate as such, but is taken up into the subsequent order of the Commis-

sion and therefore is subject to review after it has been given that form. But as against these considerations it must be remembered that the requirement that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity. Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the State Court when at least it is possible that as we have said it would find itself too late if it afterwards went to the District Court of the United States. *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U. S. 196. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290.

The argument that the plaintiff is barred by contract needs but a word. We will assume for the purposes of decision that the plaintiff by coming in under the State law made a contract, and as part of it adopted the statutory method of getting its rates changed. But it would be extravagant to say that it did more than adopt that method in its general character and with its ordinary incidents. If apart from the supposed contract a party would have been entitled to go to the Court of the United States at the stage when the plaintiff went there, no reasonable interpretation of the contract forbad the plaintiff to go, and there is no need to consider whether the contract could have forbidden it if it had tried.

Finally as to the rights of the appellants. It is said that the appeal of the City is cut off by the course the plaintiff has taken. But of course the City would not appeal except on the ground that the plaintiff already was given too favorable terms. The City is in the present case and when as here the plaintiff succeeds in showing that these terms are inadequate on constitutional grounds, the City has had its day and has failed, and the loss of its appeal is merely a consequence of a trial in which it has been heard and has lost.

Decree affirmed.

Mr. Justice BUTLER took no part in this case.